TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 1212.

ROMEO LEWIS, HUGH SAUNDERS, RICHARD C. SAUNDERS, JUNIOR, ET AL., PLAINTIFFS IN ERROR,

vs.

JOSEPH PHILLIPS AND LENA PHILLIPS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED JUNE 15, 1891.

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1 UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Northern District of Illinois, Southern Division.

Pleas in the circuit court of the United States for the northern district of Illinois, in the southern division thereof, begun and holden at the United States court-house, in the city of Peoria, in said southern division of said district, on the third Monday in October, in the year of our Lord one thousand eight hundred and ninety, before the Honorable Henry W. Blodgett, judge of the district court of the United States for the said northern district of Illinois and *ex officio* judge of said circuit court.

Be it remembered that heretofore, to wit, on the second day of September, A. D. 1889, there was filed in the office of the clerk of said circuit court a præcipe for a summons in the words and figures following, to wit:

In the United States Circuit Court for the Northern District of Illinois, Southern Division, October Term, A. D. 1889.

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ROMEO LEWIS, HUGH SAUNDERS, Richard C. Saunders, Jr., Susan North Dew, Ellen Maria Dew, and Lavina Harwood *vs.* JOSEPH PHILLIPS and LENA PHILLIPS.	Ejectment. Damages, $2,000.

You will please issue a summons in the above-entitled cause, directed to the marshal to execute.

PUTERBAUGH & PUTERBAUGH,
THOMAS MILLIKIN AND
PALMER W. SMITH,
Attorneys for Plaintiffs.

To the clerk of said court.

Be it further remembered that on the said second day of September, A. D. 1889, there was filed in the office of the clerk of said circuit court a declaration in the words and figures following, to wit:

United States Circuit Court for the Northern District of Illinois, Southern Division, October Term, A. D. 1889.

UNITED STATES OF AMERICA,
Northern District of Illinois, Southern Division, } *ss:*

Romeo Lewis, who is a citizen of the State of Indiana, and Hugh Saunders, Richard C. Saunders, Jr., Susan North Dew, Ellen
3 Maria Dew, and Lavina Harwood, who are citizens of the State of Texas, plaintiffs, by Puterbaugh & Puterbaugh, Thomas Millikin, and Palmer W. Smith, their attorneys, complain

of Joseph Phillips and Lena Phillips, who are citizens of the State of Illinois, defendants, of a plea of ejectment; for that the plaintiffs, on the first day of August, in the year A. D. 1888, were possessed of several certain parcels of lands, with the appurtenances, lying and being in the county of Woodford, in the said southern division of the northern district of Illinois, to wit:

The northeast quarter of section twenty-five (25) and the northeast quarter of the southeast quarter and fifty-five (55) acres off of the north end of the west half of the southeast quarter of said section twenty-five (25), in township twenty-seven (27) north, range one (1) east, of the third (3d) principal meridian, containing 255 acres, more or less, and of great value, to wit, twelve thousand dollars; which said lands and tenements the plaintiffs claim in fee; and, the plaintiffs being so possessed thereof, the defendants afterwards, to wit, on the 2d day of August, A. D. 1888, entered into the said tenements and now unlawfully withhold from the plaintiffs the possession thereof, to the damage of the plaintiffs of two thousand dollars, and therefore they bring their suit.

By PUTERBAUGH & PUTERBAUGH,
THOMAS MILLIKIN AND
PALMER W. SMITH,
Their Attorneys.

And be it further remembered that on the said second day of September, A. D. 1889, there was filed in the office of the clerk of said circuit court a security for costs in the words and figures following, to wit:

4 Circuit Court of the United States, Northern District of Illinois, Southern Division.

ROMEO LEWIS *et al.*
vs.
JOSEPH PHILLIPS *et al.*
} Ejectment.

I enter myself security for costs in this cause and promise to pay all costs which may accrue to the opposite parties in this action or to any of the officers of this court, and in default of payment by the plaintiffs of any costs ordered or adjudged to be paid by them I hereby agree and stipulate that execution may issue against my property for any costs taxed against plaintiffs.

Dated this 2nd day of September, A. D. 1889.

LEE S. HARRISON.

And be it further remembered that on the said 2nd day of September, A. D. 1889, there issued from the office of the clerk of said court, under the seal thereof, a summons in the words and figures following, to wit:

THE UNITED STATES OF AMERICA:

To the marshal of the northern district of Illinois, Greeting:

We command you to summon Joseph Phillips and Lena Phillips, if they shall be found in the southern division of your district,

personally to be and appear before our judges of our circuit court of the United States for the northern district of Illinois on the first day of the next term thereof, to be holden at Peoria, in the division and district aforesaid, on the third Monday of
5 October next, to answer unto Romeo Lewis, Hugh Saunders, Richard C. Saunders, Jr., Susan North Dew, Ellen Maria Dew, and Lavina Harwood in an action of ejectment, to the damage of the said plaintiffs, as they say, of two thousand dollars, to recover the possession of certain premises, viz., certain tracts of land, with the appurtenances, situated in the county of Woodford, in the division and district aforesaid, and known, designated, and described as follows:

The northeast quarter of section twenty-five (25) and the northeast quarter of the southeast quarter and fifty-five (55) acres off of the north end of the west half of the southeast quarter of said section twenty-five (25), in township twenty-seven (27) north, range one (1) east, of the 3d P. M., containing 255 acres, more or less; in which premises the said plaintiffs claim an estate in fee; and have you then and there this writ, with a return of your doings thereon.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of our said circuit court, at Peoria aforesaid, this 2d day of September, in the year of our Lord one thousand eight hundred and eighty-nine, and of our Independence the 114th year.

[L. S.] WILLIAM H. BRADLEY, *Clerk*,
By ENOCH P. SLOAN, *Ch. Dep. Clerk.*

Which said summons was afterwards, to wit, on the 27th day of September, A. D. 1889, returned to the office of the clerk of said circuit court and duly filed, indorsed in the words and figures following, to wit:

I have personally served this writ by reading — to the within-named Joseph Phillips and Lena Phillips this 9th day of Septem-
6 ber, 1889.

F. H. MARSH,
U. S Marshal,
By C. L. BERRY, *Deputy.*

Marshal's fees, $6.58, paid by Puterbaugh & Puterbaugh.

And be it further remembered that afterwards, to wit, on the 26th day of September, A. D. 1889, came the defendants, by their attorneys, and filed in the office of the clerk of said circuit court a plea in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, at Peoria.

United States Circuit Court, to the October Term, A. D. 1889.

ROMEO LEWIS, HUGH SAUNDERS, RICHARD C. SAUNDERS, JR., SUSAN NORTH DEW, ELLEN MARIA DEW, and LAVINA HARWOOD
vs.
JOSEPH PHILLIPS and LENA PHILLIPS.

And now come the defendants, by their attorneys, and defend the wrong and injury, when, etc., and say that they are not guilty of unlawfully withholding the tenements in the said declaration mentioned, or any part thereof, in manner and form as the plaintiffs have above thereof complained against them; and of this the defendants put themselves upon the country, etc.

By WILLIAMS & CAPEN AND
WALTER S. GIBSON,
Their Attorneys.

7 And afterwards, to wit, at the April term of said court, on the 22nd day of April, A. D. 1890, before the Honorable Henry W. Blodgett, judge as aforesaid of said court, the following further proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the Northern District of Illinois, Southern Division, April Term, A. D. 1890.

ROMEO LEWIS *et al.*
vs.
JOSEPH PHILLIPS and LENA PHILLIPS. } In Ejectment.

And now come the plaintiffs, by Puterbaugh & Puterbaugh, their attorneys, and suggest to the court that since the commencement of this suit, to wit, on the 20th day of February, A. D. 1890, Susan North Dew, one of the plaintiffs herein, departed this life intestate, leaving as her children and heirs-at-law Hugh Dew, George Dew, T. R. Dew, Reuben Dew, Henry Dew, May Dew, and Jessie Dew, who are all minors, and also left her surviving her husband, Thomas T. Dew, and that on the 14th day of April, A. D. 1890, the said Thomas T. Dew was by the county court of the county of Lavaca, in the State of Texas, where the said minor heirs reside, duly appointed guardian of said minor heirs, and duly qualified as such.

The plaintiffs therefore move the court that the said heirs of the said Susan North Dew, the said minors by their said guardian, may be admitted to prosecute this suit jointly with the surviving
8 plaintiffs in the same manner as if they had originally joined with them in commencing the action.

On consideration the foregoing motion is allowed, and by agreement of the parties to this suit this cause is set down for hearin g next Monday morning.

And afterwards, to wit, during the last-named term of said court, on the 28th day of April, A. D. 1890, a stipulation was filed in said cause in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Illinois, April Term, A. D. 1890.

ROMEO LEWIS *et al.*
vs.
JOSEPH PHILLIPS and LENA PHILLIPS. } Ejectment.

Same *vs.* Oliver M. Dye & Tillie Dye. Same *vs.* William F. Mohr. Same *vs.* James Dye. Same *vs.* Andrew Johnson & Henry Funk. Same *vs.* Celicia Boner & Charles Boner. Same *vs.* John Klug. Same *vs.* Celicia Boner. Same *vs.* Onno Dirks and Charles Boner. Same *vs.* Charles McHugh. Same *vs.* Martha E. Pleasants & James Pleasants. Same *vs.* Jacob Michael.

It is stipulated and agreed by and between each of the parties to the above-entitled thirteen causes, now pending for trial in said circuit court, that a jury be, and the same is hereby, waived in the trial of each of said causes, and that said causes may be tried by the court.

THOMAS MILLIKIN,
PUTERBAUGH & PUTERBAUGH AND
PALMER W. SMITH,
Attorneys for Plaintiffs.

WILLIAMS & CAPEN,
W. S. GIBSON &
W. G. RANDALL,
Attorneys for Defendants.

9 And afterwards, to wit, during the said last-named term, on the said 28th day of April, A. D. 1890, before the said the Honorable Henry W. Blodgett, judge, presiding, the following proceedings were had in said cause, to wit:

ROMEO LEWIS *et al.*
vs.
JOSEPH PHILLIPS *et al.* } Ejectment.

This day came the parties to this suit, by their respective attorneys, and by agreement in writing and filed they waive trial by jury and submit this cause to be tried by the court without a jury. The said parties also agree to a statement of facts, also filed herein, and the trial commenced by oral argument on both sides. T. R. Dew, as guardian and next friend of the heirs of Susan North Dew, deceased, entered the appearance of said heirs. The court takes the case under advisement, to be further heard upon the brief of plaintiffs, to be prepared by July 1 next; the brief of defendants to be prepared by September 1 next, and the reply of plaintiffs to be prepared by October 1 next.

And afterwards, to wit, at the October term of said court, on the 21st day of October, A. D. 1890, before the Honorable Henry W. Blodgett, judge, as aforesaid, of said court, the following further proceedings were had in said cause, to wit:

ROMEO LEWIS *et al.*
vs.
JOSEPH PHILLIPS and LENA PHILLIPS. } Ejectment.

And now come again the parties, by their respective at-
10 torneys, and the court, having considered and being fully advised upon the issue heretofore submitted herein, finds the defendant- not guilty. It is therefore considered by the court that the defendants go hence without day, and that they have and recover of the plaintiffs their costs by them about their defence in this behalf expended and to be taxed, and that they have execution therefor. The court heard evidence of the value of the lands involved in this suit and finds the same to be eleven thousand four hundred and seventy-five dollars.

And afterwards, during the said last-named term, to wit, on the 23rd day of October, A. D. 1890, came the plaintiffs, by their attorneys, and filed their motion to set aside the findings of the court and for a new trial in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Illinois, Southern Division, October Term, A. D. 1890.

ROMEO LEWIS *et al.*
vs.
JOSEPH PHILLIPS and LENA PHILLIPS. } Ejectment.

And now come the plaintiffs, by their attorneys, and move the court to set aside the findings of the court in said cause and for a new trial on the ground that the court erred in the application of the law to the facts of said cause.

THOMAS MILLIKIN, PALMER W. SMITH,
PUTERBAUGH & PUTERBAUGH,
Attorneys for Plaintiffs.

11 And on the said 23rd day of October, A. D. 1890, the following further proceedings were had in said cause, to wit:

ROMEO LEWIS *et al.*
vs.
JOSEPH PHILLIPS *et al.* } Ejectment.

This cause came on to be heard on the motion of the plaintiffs for a new trial herein, and the court, being fully advised in the premises, do overrule said motion. Plaintiffs ask and obtain leave to file bill of exceptions herein in sixty days.

And be it further remembered that afterwards, to wit, on the 27th day of October, A. D. 1890, during the said last-named term, there

was filed in said cause a bill of exceptions in the words and figures following, to wit:

12 In the United States Circuit Court for the Northern District of Illinois, Southern Division, October Term, A. D. 1890.

ROMEO LEWIS *et al.*
vs.
JOSEPH PHILLIPS and LENA PHILLIPS. } Ejectment.

Bill of Exceptions.

Be it remembered that on the trial of the above-entitled cause, at the April term, A. D. 1890, of this court, a jury having been waived and a trial having been had before the court by agreement of all the parties, the said parties introduced in evidence an agreed statement of facts, signed by the respective parties, which, so far as applies to this particular case, is as follows, to wit:

Statement of Facts.

It is agreed that the following are admitted facts, and that proof need not be offered in support of the same in the trial of the above cause and in the cases therein mentioned:

1st. That Romeo Lewis died testate at his residence, in Oxford, Butler county, Ohio, June 24th, 1843, aged 48 years.

2nd. That he died leaving no issue surviving him, but leaving a widow, Jane N. Lewis.

3rd. That said testator, Romeo Lewis, and said Jane N. Lewis were each married but once.

4th. That said testator's will was executed January 8th, 1842, and regularly and duly probated and recorded in said Butler county, Ohio, July 13th, 1843, by the court of common pleas of said Butler county, which then had jurisdiction of probate of wills.

5th. That under said will said Jane N. Lewis entered upon and discharged her duties as executrix of the estate of said testator, and finally settled the personal estate in the proper probate court of said county April 4th, 1871.

6th. That said Jane N. Lewis, on September 2nd, A. D. 1843, in said court of common pleas, duly elected as such widow to take under such will, which election was duly entered of record and remains in force.

13 7th. That said Jane N. Lewis was born July 10th, 1808, and died as said testator's widow, without issue her surviving, at Oxford, Ohio, where she always resided, July 11, 1888.

8th. That three children were born alive to said Jane N. Lewis and the testator during their marriage, who died prior to the date of said will.

9th. That a fourth child was born alive to said Jane N. Lewis and said testator after the date of said will, to wit, on April 15th, 1843, who died April 20th, 1843, and prior to the death of said testator.

10th. That Sarah Lewis, mother of testator, pre-deceased said testator, dying April 11th, 1843.

11th. That the personal estate and proceeds of the sale of all the lands in Arkansas, Mississippi, and Florida of said testator were exhausted in paying debts, funeral expenses, costs of administration, and legacies under said will.

12th. That said testator had in his lifetime four brothers, one of whom died before the testator, leaving as his sole heir his daughter, Frances Lewis, named in said will, which said Frances also died unmarried and without issue before said testator and after the date of his said will.

13th. That the names of the other three brothers were Theodore, Willis, and Harry Lewis.

14th. That said testator had no sisters and no brothers but the four above mentioned.

15th. That said Theodore Lewis died before the testator, leaving an only son and heir, Alexander Lewis, who also died before said testator, leaving as his only issue and heir Romeo Lewis, Jr., one of the plaintiffs herein, who has always resided in Indiana.

16th. That said Willis Lewis also died before the testator, leaving as his only child and heir said Ellen Maria Lewis Saunders, named in said will, who died intestate January 12th, 1865, leaving as her only children and heirs-at-law the plaintiffs, Hugh Saunders, Richard Saunders, Jr., Susan North Dew, Ellen Maria Dew, and Lavina Harwood, who have always resided in the States of Mississippi and Texas and nowhere else.

17th. That said Harry Lewis survived his brother, the testator, dying at said Oxford June 16th, 1860, intestate, leaving a widow, Mary Lewis, and an only son as his sole surviving heir, named George M. Lewis.

18th. That said George M. Lewis died intestate, leaving no widow or child or issue, and leaving his mother him surviving, the said Mary Lewis.

19th. That the said Mary Lewis, widow of said Harry Lewis and mother of said George M. Lewis, died testate in 1883, unmarried.

20th. That said Jane N. Lewis was the residuary devisee of said Mary Lewis, and as such succeeded to all the title of said Mary Lewis in and to the lands in controversy, and that all such title as Mary Lewis had, if any, has passed to defendants by stipulation herein.

21st. That said Ellen Maria Lewis Saunders, named in said will, was a married woman, with a husband living, and without children at the date of said will, and that said Frances Lewis, Susan H. North, and Lucy D. North were unmarried women living at the date of said will.

22nd. That said testator, Romeo Lewis, was seized in fee simple of the lands in controversy by patent from the United States at the date of said will and at the date of his decease, and that
14 Romeo Lewis during the year 1838 duly entered said lands at the U. S. land office at Springfield, Ill., but that none of the defendants or their grantors or lessors or any one under whom

they claim, except Jane N. Lewis, had any notice that he was so seized until September 1st, 1889, except as appears from the Book of Land Entries in the office of the county clerk of Woodford county, Illinois, furnished by the auditor to the county clerk for the purposes of taxation, and except also such notice as may have been conveyed by deed of Jane N. Lewis to John G. Mohr, mentioned in paragraph No. 25 of these stipulations, unless the court shall find as a matter of law the said land entries in the land office at Springfield, Illinois, and records in the land office at Washington were constructive notice to defendants or those under whom they claim at the date of said deeds and bonds for deeds herein mentioned, and unless the court shall find such constructive notice from the fact, which is admitted to be true, that all said lands were assessed for taxation in 1845 in the name of Romeo Lewis, and sold for nonpayment of said taxes in 1846.

23rd. That the bond for deed from Jane N. Lewis to James A. Gilbert for the N. E. ¼ of section 25, and the N. E. ¼ of the S. E. ¼ of sec. 25, and 55 acres off the N. end of the W. ½ of S. E. ¼ of said section 25, all in T. 27 N., R. 1 E., of 3d P. M., in Woodford Co., Ill., is dated January 1st, 1857, and was recorded June 26, 1857; and the deed of Jane N. Lewis to said James A. Gilbert for said lands under said bond is dated March 10, 1864, and was properly recorded in Book 2 of Deeds, page 378, May 27th, 1864.

24th. That the defendants have a complete chain of title, properly recorded at the date of said deeds or bonds for deeds, to the lands described in the declaration in this case, under deeds, with full covenants of warranty, from Jane N. Lewis to themselves, which deeds were also properly recorded at the dates of the execution thereof, and that said lands have been actually occupied and resided upon by the defendants and their grantors from the date of the purchase thereof, as shown by said deeds from Jane N. Lewis, and that they have severally paid all taxes assessed on said lands from the date of said deeds to the present time.

25th That none of the defendants, or any of the persons through whom they claim title, except said Jane N. Lewis, had any knowledge whatever of the existence or probate of said will of testator prior to the time what purports to be a copy of said will was recorded in Book U of Records of Deeds, in the recorder's office of said Woodford county, August 15th, 1866; and the effect of such record as notice is to be determined by the court, unles the court shall determine as a matter of law that the said record and probate of said will and election of the widow in Butler county, Ohio, in 1843, is constructive notice.

26th. That Guernsey Y. Roots was the husband of said Jane N. Lewis' sister prior to and after the death of said testator, and died at Cincinnati, Ohio, which was his home for a number of years, in September, 1888.

27th. That said Guernsey Y. Roots, October 13th, 1846, purchased said lands at tax sale for the taxes of 1845, and that the said Guernsey Y. Roots knew of the existence and probate of said will and the appointment of said Jane N. Lewis as executrix thereof, and of her

election to take under said will, but none of the defendants or the parties through whom they claim, except the said Jane N. Lewis, knew of the relationship or said Guernsey Y. Root to said Jane N. Lewis, or had any knowledge of the person of said Guernsey Y. Roots except that disclosed by the records.

28th. That all said lands were at the date of said will and the death of the testator, and until conveyed by said Jane N. Lewis, as hereinbefore set forth, wild and uncultivated, of little value, and in a new and sparsely settled country.

29th. That said will of Romeo Lewis was written by the testator himself; that he was not a lawyer by profession, but a civil engineer and a man of culture and intelligence.

That on the 20th day of February, A. D. 1890, after the commencement of this suit, Susan North Dew, one of the plaintiffs, at the county of Lavaca, in the State of Texas, where she then resided, departed this life intestate, leaving T. T. Dew, her husband, and Hugh Dew, T. R. Dew, Reuben Dew, Henry Dew, George Dew, Mary Dew, and Jessie Dew, her only children and heirs-at-law; that all said children are minors; that on the 14th day of April, A. D. 1890, the said T. R. Dew was, by the county court of said county of Lavaca, in the State of Texas, having jurisdiction of the subject-matter, duly appointed guardian of the estate and person of said minors and duly qualified as such, and received from said court letters of gua-dianship.

16 The plaintiffs' counsel further introduced in evidence an exemplified copy of the will of Romeo Lewis, deceased, dated January 8th, 1842, probated in Butler county, Ohio, July 13th, 1843, for the purpose of showing that the estate of Jane N. Lewis was a life estate only, and also that it was her duty as such life tenant and as executor of the estate of said Romeo Lewis to have paid the taxes on the land in controversy, to wit:

In the name of God amen the eight day of January in the year of our Lord one thousand eight hundred and forty two I Romeo Lewis of the county of Butler State of Ohio, being through the divine blessings of God in a sound state of mind and memory but calling to mind the frail tenure of this life and that it is appointed unto all men once to die do make and ordain this my last will and testament that is to say it is my will and desire that all my interest in and to any lands in the Territory of Florida, in the States of Arkansas and Mississippi be sold upon a proper credit, that all debts due me in Florida upon bond and mortgage or otherwise, or at any other place, be collected, and that all my just debts be paid from the proceeds thereof. And I give and bequeath to my aged and venerable mother Sarah Lewis the sum of two hundred dollars, and it is my wish and desire that she occupy as her own during the residue of her life, the room in my mansion house in Oxford which was intended for her use, and that such further aid be extended to her as may be necessary for her comfort and support.

I further give and bequeath to my niece Ellen Maria Lewis Saunders now of Mississippi and to the heirs of her body the sum of one thousand dollars. I give and bequeath to Susan H. North the

further sum of one thousand dollars. I give and bequeath to Lucy D. North the further sum of one thousand dollars. I further give and bequeath to my niece Frances S. Lewis the sum of five hundred dollars. I further give and devise to my dearly beloved wife, Jane N. Lewis, and to the heirs of her body, my houses and lots in the town of Oxford, Butler county, Ohio, and all the residue of my lands in the States of Indiana and Illinois, and all the rest, residue and remainder of my personal estate, goods and chattels of every kind and description whatsoever to be equally divided between them to share and share alike. And lastly I hereby appoint my said beloved wife Jane N. Lewis sole executrix of this my last will and testament, hereby revoking all my former wills by me made. And I do hereby ratify and confirm this and no other to be my last will and testament.

In witness whereof I have hereunto set my hand and seal the day and year first above written.

ROMEO LEWIS. [L S SEAL.]

Signed, sealed, published, pronounced and declared by the said Romeo Lewis as his last will and testament in the presence of us the subscribers.

G. Y. ROOTS.
A. L. N. ROOTS.
WM. GRAHAM.

THE STATE OF OHIO, } ss:
Butler County, }

Court of Common Pleas, June Term, 1843.

Personally appeared in open court G. Y. Roots and A. L. N. Roots, of lawful age, who, being duly sworn, depose and say and each
17 for himself and herself deposeth and saith that in his and her presence the said Romeo Lewis, the testator, now deceased, acknowledged the foregoing signature and seal to be his true and proper signature and seal; that at the request and in the presence of the said testator they signed the same as witnesses thereto, and that at the time of the signing and acknowledging thereof the said testator was of sound mind and memory, of full age, and under no restraint.

G. Y. ROOTS.
A. L. N. ROOTS.

Sworn to and subscribed in open court 13 July, 1843.
TAYLOR WEBSTER, *Clerk.*

At the same time likewise appeared in open court William Graham, of lawful age, who, being duly sworn, & deposeth & saith that in his presence the said Romeo Lewis, the testator, acknowledged the foregoing writing as and for his will and testament, and that at the request of the said testator and in his presence he signed his name

thereto as a witness, and that at the time of the witnessing and acknowli-ging thereof the said testator was of sound mind and memory, of full age, and under no restraint.

WM. GRAHAM.

Sworn to and subscribed in open court 13 July, 1843.
TAYLOR WEBSTER, *Clerk.*

SECOND MONDAY, 12*th June*, 1843.

THE STATE OF OHIO, } ss:
Butler County, }

Court of Common Pleas, June Term, 1843.

Before the Honorable Elijah Vance, Esquire, president; Vincent D. Enyart, N. Wade, & James O'Connor, Esquires, associate judges.

ROMEO LEWIS, Deceased.

Be it remembered that the last will and testament of Romeo Lewis, late of the county aforesaid, deceased, being presented for probate by Jane N. Lewis, the executrix therein named, and the same being proved by the oath of G. Y. Roots, A. L. N. Roots, and William Graham, the subscribing witnesses thereto, it is ordered that the same be recorded, &c.

And hereupon the said Jane N. Lewis prays administration of the estate of the said Romeo Lewis, deceased, according to the tenor of the said last will and testament, and to her it is granted, &c., the said executrix, with William Graham, G. Y. Roots, and John H. Shuey, having given bond unto the State of Ohio in the sum of four thousand dollars.

Ordered that H. B. Mayo, P. H. Roots, and R. E. Hills be the appraisers, &c.

FOURTH MONDAY, 25*th September*, 1843.

THE STATE OF OHIO, } ss:
Butler County, }

Court of Common Pleas, September Term, 1843.

Before the Honorable Elijah Vance, Esquire, president, & Vincent D. Enyart, N. Wade, & James O'Connor, Esquires, associate judges.

ROMEO LEWIS, Deceased.

Jane N. Lewis, widow, relict of Romeo Lewis, deceased, now personally appears in open court and elects to take under the last will and testament of her said husband.

Authentication under act of Congress.

18 STATE OF OHIO, }
County of Butler. }

I, P. G. Berry, sole judge and *ex officio* clerk of the probate court in and for the said county of Butler, do hereby certify that I have

compared the foregoing copy of the records of the last will and testament and the affidavits of the subscribing witnesses thereto of Romeo Lewis, late of the county of Butler aforesaid, deceased, and the order of court admitting the same to record and granting administration thereon to Jane N. Lewis and the election of said Jane N. Lewis to take under said will, with the original records thereof now remaining in this office and in my custody, and have found the same to be transcripts therefrom and of the whole of such original records; and I further certify that said exemplification would be received in evidence in all the courts of the said State of Ohio.

In testimony whereof I have hereunto set my hand and affixed the seal of the said probate court, at Hamilton, this 11th day of February, A. D. 1890.

[SEAL.] P. G. BERRY,
Sole Judge and ex Officio Clerk of the Probate Court.

STATE OF OHIO, }
County of Butler, } *ss:*

I, P. G. Berry, sole judge of the probate court of said county, do hereby certify that P. G. Berry, whose genuine signature is affixed to the foregoing certificate, is, under the laws of Ohio, by virtue of his office as sole judge of said court also the clerk of said court, and was such clerk at the time of making and subscribing the same; that his attestation aforesaid is in due form of law and by the proper officer, and that the seal thereto affixed is the seal of the said probate court; and I further certify that said last will and testament has been admitted to probate in said county and duly recorded.

Witness my hand and seal this 11th day of February, A. D. 1890.

[SEAL.] P. G. BERRY,
Sole Judge of the Probate Court of Butler Co., Ohio.

The plaintiffs' counsel further introduced in evidence a certified copy of the records of the county of Woodford, Illinois, showing that the land in controversy was entered by Romeo Lewis in 1838 and was subject to taxation in 1844; which is the same document described in the paragraph beginning with the word "except," in the 5th line, and ending with the word "taxation," in the 7th line, of the 3rd page of this bill of exceptions. The defendants' counsel objected to this evidence as incompetent, but the same was admitted subject to such objections.

The plaintiffs' counsel also introduced in evidence a certified copy of the will of Romeo Lewis, deceased, from the records of the recorder's office of Woodford county, Illinois, in the words and figures to wit:

In the name of God amen the eight day of January in the year of our Lord one thousand eight hundred and forty two I Romeo Lewis of the county of Butler State of Ohio, being through the divine blessings of God in a sound state of mind and memory but calling to mind the frail tenure of this life and that it is appointed unto all men once to die do make and ordain this my last will and

testament that is to say it is my will and desire that all my interest in and to any lands in the Territory of Florida, in the States of Arkansas and Mississippi be sold upon a proper credit, that all 19 debts due me in Florida upon bond and mortgage or otherwise, or at any other place, be collected, and that all my just debts be paid from the proceeds thereof. And I give and bequeath to my aged and venerable mother Sarah Lewis the sum of two hundred dollars, and it is my wish and desire that she occupy as her own during the residue of her life, the room in my mansion house in Oxford which was intended for her use, and that such further aid be extended to her as may be necessary for her comfort and support.

I further give and bequeath to my niece Ellen Maria Lewis Saunders now of Mississippi and to the heirs of her body the sum of one thousand dollars. I give and bequeath to Susan H. North the further sum of one thousand dollars. I give and bequeath to Lucy D. North the further sum of one thousand dollars. I further give and bequeath to my niece Frances S. Lewis the sum of five hundred dollars. I further give and devise to my dearly beloved wife, Jane N. Lewis, and to the heirs of her body, my houses and lots in the town of Oxford, Butler county, Ohio, and all the residue of my lands in the States of Indiana and Illinois, and all the *rent*, residue and remainder of my personal estate, goods and chattels of every kind and description whatsoever to be equally divided between them to share and share alike. And lastly I hereby appoint my said beloved wife Jane N. Lewis sole executrix of this my last will and testament, hereby revoking all my former wills by me made. And I do hereby ratify and confirm this and no other to be my last will and testament.

In witness whereof I have hereunto set my hand and seal the day and year first above written.

ROMEO LEWIS. [SEAL.]

Signed, sealed, published, pronounced, and declared by the said Romeo Lewis as his last will and testament in the presence of us, the subscribers.

G. Y. ROOTS.
A. L. N. ROOTS.
WM. GRAHAM.

THE STATE OF OHIO, *Butler County*, } ss:

Court of Common Pleas, June Term, 1843.

Personally appeared in open court G. Y. Roots and A. L. *B.* Roots, of lawful age, who, being duly sworn, depose and say, and each for himself and herself deposeth and saith, that in his and her presence the said Romeo Lewis, the testator, now deceased, acknowledged the foregoing signature and seal to be his true and proper signature and seal; that at the request and in the presence of the said testator they signed the same as witnesses thereto, and that at the time of the

signing and acknowledging thereof the said testator was of sound mind and memory, of full age, and under no restraint.

G. Y. ROOTS.
A. L. N. ROOTS.

Sworn to and subscribed in open court 13 July, 1843.
TAYLOR WEBSTER, *Clerk.*

At the same time likewise appeared in open court William Graham, of lawful age, who, being duly sworn, & deposeth & saith that in his presence the said Romeo Lewis, the testator, acknowledged the foregoing writing as and for his will and testament, and that at the request of the said testator and in his presence he signed his name thereto as a witness, and that at the time of the witnessing and acknowledging thereof the said testator was of sound mind and memory, of full age, and under no restraint.

WM. GRAHAM.

Sworn to and subscribed in open court 13 July, 1843.
TAYLOR WEBSTER, *Clerk.*

THE STATE OF OHIO, *Butler County,* } ss:

Probate Court.

I, Z. W. Selby, sole judge and *ex officio* clerk of the probate court within and for the county aforesaid, do hereby certify the foregoing to be a true and correct copy of the last will and testament of Romeo Lewis, late of said county, deceased, and of the affidavit of the subscribing witness thereto, and of the order and proceedings of said court admitting the same to probate, the said copies of said will, affidavit, order, and proceedings having been taken from the originals on file and of record in said court.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the probate court, at Hamilton, the 2d day of August, in the year of our Lord one thousand eight hundred and sixty-six.

[SEAL.]

Z. W. SELBY,
Probate Judge and ex Officio Clerk.

{ Revenue stamp 5c., cancelled. }

Filed for record Aug. 15, 1866."

STATE OF ILLINOIS, *Woodford County,* } ss:

I, J. C. Irving, clerk of the circuit court and *ex officio* recorder within and for the county of Woodford, in the State aforesaid, do hereby certify that the above and foregoing is a true and correct copy of the record of the "copy" of the "will" of Romeo Lewis, as the same appears of record in my office in Deed Record "U," on

pages 621, 622, and 623 of said record. I further certify that I am the keeper of the said record and of the seal of said circuit court.

In testimony whereof I have hereunto subscribed my name and affixed my official seal, at Metamora, in said county, this 25th day of April, A. D. 1890.

J. C. IRVING,

[SEAL.] *Circuit Clerk and ex Officio Recorder of Woodford Co., Ill.*

Defendants' counsel objected to the introduction of said paper, because, 1st, it was not a record, because it did not show any order of court of Butler Co., Ohio, admitting said will to probate; 2d, because the same was not properly certified; but same was admitted, subject to said objection.

The plaintiffs' counsel also introduced in evidence a certified copy of what purports to be a sheriff's deed to Jane N. Lewis, dated May 16th, 1846, not for the purpose of showing title nor for the purpose of laying a foundation for a claim of color of title, but for the limited purpose of showing that the taxes for the year mentioned were paid by Jane N. Lewis, and that the proceeding to have the land in question sold for taxes and bid in was fraudulent on behalf of said Jane N. Lewis, to defeat the remainder or reversionary interests that might exist, and that such proceeding was a substantial payment of said taxes by her. The defendants' counsel objected to the same as incompetent for the purpose offered; but the court admitted the same, subject to objection.

21 Which said certified copy of said tax deed is as follows, to wit:

David Irving, sh'ff, to Jane N. Lewis. } Deed No. 1171. Recorded May 16th, 1849.

Know all men by these presents that whereas, at the September term, 1846, of the circuit court of Woodford county, a judgment was obtained in said court in favor of the State of Illinois against the following-described tracts of land situate in said county of Woodford and State of Illinois, viz:

The west half of the northeast quarter of section three (3), the west half of the southwest quarter of section three (3), the west half of the northeast quarter of section (10), the east half of the northwest quarter of section ten (10), the west half of the southeast quarter of section ten (10), the east half of the southwest quarter of section ten (10), all in township twenty-six (26) north, of range one (1) east, of the third principal meridian; also the east half of the northeast quarter of section twenty-three (23), the east half of the southeast quarter of section twenty-five (25), the west half of the northeast quarter of section twenty-five (25), the east half of the northeast quarter of section twenty- — (25), the east half of the west half of the southeast quarter of section (25), the east half of the northeast quarter of section thirty-six (36), the west half of the northeast quarter of section thirty-six (36), the west half of the southwest quarter

of section thirteen (13), the east half of the southeast quarter of section fourteen (14), the west half of the northwest q-arter of section twenty-four (24), the ten last-described tracts in township twenty-seven (27) north, of range one (1) east, of the third principal meridian; also the west half of the southwest quarter of section thirty (30), the west half of the southeast quarter of section thirty (30), the east half of the northeast quarter of section thirty-one (31), the three, 3, last-described tracts in township twenty-seven (27) north, of range two (2) east, of the third principal meridian, for the sum of thirty-three dollars and seventy-three cents, being the amount of taxes, interest, and costs assessed upon said tracts of land for the year 1845; and whereas, on the thirteenth (13) day of October, A. D. 1846, William C. Martin, sheriff of the county aforesaid, by virtue of a precepe issued out of the circuit court of the county aforesaid, dated September twentieth (20), A. D. 1846, and to the sheriff of said county directed, did expose to public sale at the door of the court-house, in the county aforesaid, in conformity with all the requisitions of the statute in *in* such case made and provided, the tracts of land above described for the satisfaction of the judgment so rendered as aforesaid; and whereas, at the time and place aforesaid, Gurnsey Y. Roots, of the State of Ohio, having offered to pay thirty-two dollars an- seventy-seven cents, part of the amount aforesaid, for the W. ½ N. E. ¼, W. ½ S. W. ¼, of sec. three (3); W. ½ N. E. ¼, E. ½ N. W. ¼, W. ½ S. E. ¼, E. ¼ S. W. ¼, of sect. ten (10), all in T. 26 N., R. one (1) east; the E. ½ N. E. ¼ of sec. 23; E. ½ S. E. ¼, W. ½ N. E. ¼, W. ½, E. ½ N. E. ¼, of sect. 25; E. ½ N. E. ¼, W. ½ N. E. ¼, of sec. 36; W. ½ S. W. ¼ of sec. 13, E. ½ S. E. ¼ of sect. 14, W. ½ N. W. ¼ of sec. 24, the last nine (9) tracts in T. 27 N., R. one (1) east; and W. ½ S. W. ¼, W. ½ S. E. ¼, of sec. 30; E. ½ N. E. ¼ of sec. 31, the three last tracts in T. 27 N., R. two (2) east, part of the land above described, which was the least quantity bid for the said lands, was stricken of- to him at that price; and

whereas also, at the time and place aforesaid, George W.
22 Casseday, of the county of Vermillion, offered to pay ninety-six cents, part of the first amount mentioned, for E. ½, W. ½ S. E. ¼, of sec. 25, T. 27 N., R. 1 E., one of the tracts first mentioned, which was the least quantity bid for the tract of land, was stricken off to him at that price; and whereas the said Guernsey Y. Roots did by his endorsement, under his hand, written on the back of the certificate of purchase to him executed by the clerk of the county commissioners' court of said Woodford county for the tracts of land so sold as aforesaid, at the time of said sale (said endorsement is without date), assign the said certificate of purchase to Jane N. Lewis, of the State of Ohio; and whereas the said George W. Casseday did by his endorcement, under his hand, written on the back of the certificate to him executed by the clerk of the county commissioners' court of said Woodford county for the tract of land so sold as aforesaid, at the time of said sale, said endorsement bearing date the twenty-fifth day of March, A. D. 1849, assign the said certificate of purchase to Jane N. Lewis, of the State of Ohio:

Now, therefore, I, David Irving, sheriff of Woodford county, for and in consideration of the said sum of thirty-three dollars and seventy-three cents in hand paid by the said Guernsey Y. Root & George W. Casseday at the time of the aforesaid sale, and by virtue of the statute in such cases made and provided, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said Jane N. Lewis, as assignee of Guernsey Y. Root & George W. Casseday, her heirs and assigns, the above-described tracts of land, viz: The west half of the northeast quarter of section three (3), the west half of the southwest quarter of section three (3), the west half of the northeast quarter of section ten (10), the east half of the northwest quarter of section ten (10), the west half of the southeast quarter of section ten (10), the east half of the southwest quarter of section ten (10), all in township twenty-six (26) north of range one (1) east; the east half of the northeast quarter of section twenty-three (23), the east half of the southeast quarter of section twenty-five (25), the west half of the northeast quarter of section twenty-five (25), the east half of the northeast quarter of section twenty-five (25), the east half of the west half of the southeast quarter of section twenty-five (25), the east half of the northeast quarter of section thirty-six (36), the west half of the northeast quarter of section thirty-six (36), the west half of the southwest quarter *of quarter* of section thirteen (13), the east half of the southeast quarter of section fourteen (14), the west half of the northwest quarter of section twenty-four (24), the ten (10) last-described tracts all in township twenty-seven (27) north of range one (1) east; also the west half of the southwest quarter of section thirty (30), the west half of the southeast quarter of section thirty (30), and the east half of the northeast quarter of section thirty-one (31), the three (3) last-described tracts in township twenty-seven (27) north, of range two (2) east, of the third principal meridian; to have and to hold unto the said Jane N. Lewis, her heirs and assigns forever, subject, however, to all the right of redemption provided by law.

In witness whereof I, David Irving, sheriff as aforesaid of the authority aforesaid, have hereto subscribed my name and affixed my seal this sixteenth day of May, in the year of our Lord one thousand eight hundred and forty-nine.

DAVID IRVING, [s.]
Sheriff of Woodford County, Illinois.

23 STATE OF ILLINOIS, }
Woodford County, } *ss:*

I certify that on the sixteenth day of May, in the year of our Lord one thousand eight hundred and forty-nine, personally appeared before me, John J. Perry, clerk of the county commissioners' court for the county aforesaid, David Irving, sheriff of said Woodford county, who is personally known to me, the said clerk, to be the identical person whose name is subscribed to the foregoing deed as having executed the same, and acknowledged that he had executed said deed for the uses and purposes therein mentioned. In testi-

mony whereof I have hereunto subscribed my name and affixed the seal of said court the day and year above written.

[L. S.] JOHN J. PERRY, *Clerk.*

STATE OF ILLINOIS, }
Woodford County, } *ss:*

I, J. C. Irving, clerk of the circuit court and *ex officio* recorder within and for the -ounty and State aforesaid, do hereby certify that the above and foregoing, on pages numbered from one to —, inclusive, is a true and correct copy of a tax deed from David Irving, sheriff of Woodford *g*ounty, Illinois, to Jane N. Lewis, as the same appears of record in Deed Record "C," on pages 368, 369, and 370, now in my office.

I further certify that I am the keeper of the records and seal of said circuit court.

Witness my hand and the seal of said circuit court, at Metamora, Illinois, this 27th day of August, A. D. 1889.

[SEAL.] J. C. IRVING,
Circuit Clerk.

The plaintiffs' counsel then called as a witness in their behalf J. C. IRVING, who testified that he was and had been for about two years clerk of the circuit court and recorder of Woodford county, Illinois; that he had examined the records in his office with reference to the entering of a judgment against the lands in controversy for the taxes of the year 1845, and that he was unable to find any record of any such judgment in his office; that he had examined the tax books of Woodford county for the years 1844 and 1845 and finds that the lands in controversy for those years were assessed in the name of Romeo Lewis as patentee and owner.

To which defendants' counsel objected as being incompetent evidence for the purposes for which it was offered; but the court admitted it, subject to the objection.

The plaintiffs' counsel then proved by the entries in the tax books of Woodford county for the years 1844 and 1845 that the lands in controversy were assessed for taxes in the name of Romeo Lewis as patentee and owner.

To which defendants' counsel objected as being incompetent evidence for the purposes for which it was offered; but the court admitted it, subject to the objection.

The plaintiffs thereupon rested their case.

Whereupon the defendants, by their counsel, offered in evidence the same tax deed hereinbefore referred to for the purpose of showing color of title. The plaintiffs' counsel objected to the said tax deed being admitted in evidence for the purpose stated, for the reason that there is no evidence of any judgment against said lands for taxes. The said tax deed was admitted, subject to objection.

This was all the evidence in said cause.

24 The court thereupon found the material facts to the questions involved in the case as admitted by the written stipula-

tion above mentioned, and held as a matter of law that the defense under the statute of limitations is complete. To this decision of the court upon such question of law the plaintiffs, by their counsel, then and there excepted.

The plaintiffs, by their counsel, thereupon moved the court for a new trial in said cause on the ground that the court had erred in the application of the law to the facts in the case as found by the court; which motion was overruled by the court; to which the plaintiffs, by their counsel, then and there excepted.

The court thereupon found the defendants not guilty, and rendered a judgment in accordance with such finding; to the rendering of which judgment the plaintiffs, by their counsel, then and there excepted.

And forasmuch as the matters above set forth do not fully appear of record, the plaintiffs tender this their bill of exceptions and pray that the same may be signed and sealed by the judge of this court, which is accordingly done this 27th day of October, A. D. 1890.

H. W. BLODGETT, *Judge.* [SEAL.]

25 And afterwards, to wit, on the 8th day of January, A. D. 1891, there was filed in the office of the clerk of said court a præcipe for a writ of error in the words and figures following, to wit:

In the United States Circuit Court for the Northern District of Illinois, Southern Division.

ROMEO LEWIS, HUGH SAUNDERS, RICHARD C. SAUNDERS, Jr., Ellen Maria Dew, Lavina Harwood, Hugh Dew, T. R. Dew, Reuben Dew, Henry Dew, George Dew, May Dew, and Jessie Dew
vs.
JOSEPH PHILLIPS and LENA PHILLIPS. } Ejectment.

The above-named plaintiffs, conceiving themselves aggrieved by the judgment entered in said cause at the October term thereof, do hereby pray that a writ of error issue herein from the Supreme Court of the United States, and that a transcript of the record and proceedings in said cause, duly authenticated, may be sent to the Supreme Court of the United States, and that citation issue to said defendants.

Peoria, Ill., December 26, 1890.

PUTERBAUGH & PUTERBAUGH,
THOMAS MILLIKIN, AND
PALMER W. SMITH,
Attorneys for Plaintiffs.

26 NORTHERN DISTRICT OF ILLINOIS, *Southern Division,* } *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, southern division, do hereby certify that the foregoing is a full, true, and complete transcript of the record and proceedings in the cause wherein Romeo Lewis, Hugh Saunders, Richard C. Saunders, Jr., Susan North Dew, Ellen Maria Dew, Lavina Harwood, Hugh Dew, T. R. Dew, Reuben Dew, Henry Dew, George Dew, May Dew, and Jessie Dew are plaintiffs and Joseph Phillips and Lena Phillips are defendants as fully as the same appears of record and remains on file in my office.

Seal of Circuit Court U. S., Northern Dist. Illinois, Southern Division, 1887.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Peoria, in said southern division of said northern district of Illinois, this 6th day of April, in the year of our Lord one thousand eight hundred and ninety-one, and of our Independence the 115th year.

WM H. BRADLEY, *Clerk,*
By ENOCH P. SLOAN,
Chief Deputy Clerk.

27 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Illinois, southern division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Romeo Lewis, Hugh Saunders, Richard C. Saunders, Jr., Ellen Maria Dew, Lavina Harwood, Hugh Dew, T. R. Dew, Reuben Dew, Henry Dew, George Dew, May Dew, and Jessie Dew, plaintiffs, and Joseph Phillips and Lena Phillips, defendants, a manifest error hath happened, to the great damage of the said Romeo Lewis, Hugh Saunders, Richard C. Saunders, Jr., Ellen Maria Dew, Lavina Harwood, Hugh Dew, T. R. Dew, Reuben Dew, Henry Dew, George Dew, May Dew, and Jessie Dew, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and

according to the laws and customs of the United States should be done.

Seal of Circuit Court U. S., Northern Dist. Illinois, Southern Division, 1887.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 8th day of January, in the year of our Lord one thousand eight hundred and ninety-one.

WM. H. BRADLEY,
Clerk of the Circuit Court of the United States for the Northern District of Illinois, Southern Division.

28 [Endorsed:] Romeo Lewis *et al. vs.* Joseph Phillips *et al.* Writ of error. Filed Jan. 8, 1891. W. H. Bradley cl'k, by E. P. Sloan, ch. dep. cl'k.

29 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Joseph Phillips and Lena Phillips, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, southern division, wherein Romeo Lewis, Hugh Saunders, Richard C. Saunders, Jr., Ellen Maria Dew, Lavina Harwood, Hugh Dew, T. R. Dew, Reuben Dew, Henry Dew, George Dew, May Dew, and Jessie Dew are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry W. Blodgett, acting judge of the circuit court of the United States for the southern division, this 12th day of January, in the year of our Lord one thousand eight hundred and ninety-one.

H. W. BLODGETT,
Dist. Judge Holding Cir. Court.

30 [Endorsed:] Romeo Lewis *et al. vs.* Joseph Phillips *et al.* Citation. I accept service of the within citation for the defendants in error. R. E. Williams, attorney for defendants in error. March 12, 1891. Filed March 13, 1891. W. H. Bradley, cl'k, by E. P. Sloan, ch. dep.

31 In the Supreme Court of the United States.

ROMEO LEWIS *et al.*, Plaintiffs in Error,
vs.
JOSEPH PHILLIPS and LENA PHILLIPS, Defendants in Error.
} Assignment of Errors.

And now come the said Romeo Lewis *et al.*, the plaintiffs in error, by Sabin D. Puterbaugh, their attorney, and say that in the record

and proceedings and in rendering judgment aforesaid there is manifest error, in this, to wit:

I. The court below erred in its conclusions of law upon the facts in the case as found by the court.

II. The court below erred in holding as a matter of law that the defense under the statute of limitations is complete.

III. The court below erred, under the facts in the case as found by the court, that the defendants are not guilty and in rendering judgment accordingly for the defendants.

Wherefore the plaintiffs in error pray that the judgment of the court below may be in all things reversed, etc.

SABIN D. PUTERBAUGH,
Attorney for Plaintiffs in Error.

Endorsed on cover: N. Illinois C. C. U. S. No. 1212. Romeo Lewis *et al.*, plaintiffs in error, *vs.* Joseph Phillips and Lena Phillips. Filed June 15, 1891.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1891.

NO. 1211.

ROMEO LEWIS, et al.
Plaintiffs in Error.
vs.
ABRAHAM BARNHART and
JOSEPHUS A. GISH,
Defendants in Error.

Error to Southern Division of Northern District of Illinois.

ARGUMENT FOR PLAINTIFFS IN ERROR.

The questions of fact and law involved in this case, and in the six succeeding cases, numbered 1212 to 1217 inclusive, being in all material respects substantially the same, counsel for the respective parties have entered into a stipulation, that the same may be submitted by both parties on printed arguments, to be filed within the first ninety days of the October term, A. D. 1891, as provided in Rule 20, of said Court; and that the printed arguments filed in this case shall be taken and considered as applicable to all the other cases.

THE FACTS IN ALL THE CASES

submitted by this argument, as they appear from the records, and stipulations of the respective parties, and the evidence heard by the Court upon the trial are substantially these:

In the year 1838, ROMEO LEWIS, of Oxford, Butler County, Ohio, duly entered the lands in controversy, and received patents therefor from the United States. He died, testate, at his residence in Oxford, on the 24th day of June, 1843, leaving a widow, Jane N. Lewis, but no children or other descendants surviving him. He executed a last will and testament on the 8th day of January, 1842, which was duly probated in the proper court of Butler County, Ohio, July 13th, 1843, under which his widow, Jane N. Lewis, was duly appointed executrix, and qualified as such, and entered upon the discharge of her duties as such executrix.

The will, after directing that his lands in Florida, Arkansas and Mississippi be sold, and the proceeds of the sales applied to the payment of his debts and certain money legacies, contained the following residuary clause:

"I further give and devise to my dearly beloved wife, Jane N. Lewis, and to the heirs of her body, my houses and lots in the Town of Oxford, Butler County, Ohio, and all the residue of my lands in the States of Indiana and Illinois, and all the rest, residue and remainder of my personal estate, goods and chattels of every kind and description whatsoever, to be equally divided between them, to share and share alike."

On the 25th day of September, 1843, Jane N. Lewis, the widow, appeared in open Court and duly

elected to take the provisions made for her in said will; which election was duly entered of record in said Probate Court. On the 4th day of April, 1871, she made a final settlement in said Probate Court of the matters of the personal property of said estate.

During their marriage, but *prior* to the date of said will, the said Romeo Lewis and his said wife had had three children born unto them, all of whom died prior to the date of the will. *After* the execution of the will, on April 15th, 1843, a fourth child was born to them, but it only lived five days, dying April 20th, 1843, prior to the death of the testator.

Jane N. Lewis never married again. She died on the 11th day of July, 1888, at the age of eighty years, without issue. There was no living issue of Mrs. Lewis at the date of the will, nor at the testator's death, nor at her death.

The stipulations in the cases admit that the plaintiffs in error are the only heirs at law of the said Romeo Lewis, deceased, they being the direct descendants of his brothers and sisters.

At the date of the death of said Romeo Lewis he owned over 1600 acres of land in Woodford County, Ill., being the lands in controversy in the several cases submitted. He derived title thereto by patents from the United States. The lands were then wild and uncultivated. On the 1st day of January, 1844, the Auditor of State certified to the Clerk of the County Court of Woodford County the lands in question as having been entered in the year 1838, and as being subject to taxation in the year 1844. This abstract from the Auditor's office showed that the lands had all

been entered by said Romeo Lewis, and the same was duly entered of record in the said County Clerks office. The lands were all assessed for the years 1844 and 1845 in the name of Romeo Lewis as owner and patentee, as shown by the records of said County.

Jane N. Lewis, the owner of the life estate, and the executrix of the will of her husband, failed to pay the taxes on said lands for the year 1845, and permitted the same to be sold for said taxes; and one Guernsey Y. Roots, her brother-in-law, bid them in at the tax sale, and obtained a certificate of purchase therefor, which he assigned to said Jane N. Lewis; and she afterwards, on the 16th day of May, 1849, procured a tax deed from the Sheriff of said Woodford County to herself for all of said lands.

It is shown by the records of said Woodford County that no judgment for taxes was ever obtained against said lands for the alleged taxes due, as recited in said tax deed to said Jane N. Lewis.

It is admitted in all the cases, that neither of the defendants to the several suits, nor any of the persons through whom they claim title, respectively, except the said Jane N. Lewis, had any knowledge of the existence or probate of the will of said Romeo Lewis, deceased, prior to the time when what purports to be a copy thereof was recorded in the Recorder's office of said Woodford County, in Book U of Deeds on the 15th day of August, A. D. 1866. .

It was further stipulated that the defendants in each of the cases have a complete chain of title, properly recorded, to the lands involved in each of said cases, under deeds, with full covenants of warranty,

from Jane N. Lewis to themselves by mesne conveyances; and that said lands have been actually occupied and resided upon by the defendants and their grantors, respectively from the dates of their respective purchases thereof, as shown by there respective bonds for deeds, and deeds from Jane N. Lewis; and that they have severally paid all taxes assessed on said lands from the dates of their respective deeds to the present time

SPECIAL FACTS APPLICABLE TO THE SEVERAL CASES.—The records in all the cases, and the questions involved for the consideration of the Court are substanially alike, with the exception of the names of the parties defendant, the dates of the bonds for deeds, and the deeds, and the description of the lands in controversy in each suit respectively, subject to the facts specially applicable in the several cases, as stated below:

In No. 1211, *Romeo Lewis et al.* vs. *Abraham Barnhart* and *Josephus A. Gish*, it is stipulated that on the 7th day of May, 1856, Jane N. Lewis gave to one Harry Lewis a power of attorney, authorizing him to sell and contract to sell the lands in question; and that on the 21st day of June, 1856, he made a contract in writing with one Absalom Dehority, by which he agreed to make a good and sufficient warranty deed to said Dehority of the lands involved in said suit, on payment of $5,600, according to the terms of certain promissory notes of said Dehority, of even date with said contract; that said Dehority at once entered upon the possession of said lands, claiming the same under said contract, and began improv-

ing the same, and within the next two years had fenced all of said lands, built two houses thereon, and had a large part of it under cultivation; and continued to so reside upon the same until his death, in 1876; then on the 31st day of August, 1866, subsequent to the recording of a copy of said will, said Jane N. Lewis, in order to carry out the contract of sale made by said Harry Lewis, made a warranty deed to said Dehority for said lands; and that the defendant, Josephus A. Gish, now holds the same by mesne conveyance, making a complete chain of title from the heirs of said Dehority; that the said Abraham Barnhart is a tenant of said Gish.

The value of the lands involved in this suit was found by the Court to be $19,000.

In No. 1212, *Romeo Lewis et. al.* vs. *Joseph Philips et al.*, the bond for a deed for the lands in controversy from Jane N. Lewis to James A. Gilbert is dated January 1st, 1857, and recorded January 26th, 1857; and the deed from Jane N. Lewis to said Gilbert for the same, in pursuance of said bond, is dated March 10th, 1864, and recorded May 27th, 1864; and the defendants have a complete chain of title to said lands by mesne conveyance from said Jane N. Lewis, and those under whom they claim; and been in the actual possession, and paid all taxes assessed thereon from the date of said bond for a deed.

The value of said lands involved in this suit was found by the Court to be $11,475.

In No. 1213, *Romeo Lewis et. al.* vs. *Andrew Johnson et. al.*, the bond for a deed from Jane N. Lewis to James A. Gilbert for the land in controversy

is dated January 1st, 1857, and recorded June 26th, 1857; and the deed from said Jane N. Lewis to said Gilbert for said land is dated March 10th, 1864, and recorded May 27th, 1864; and the defendants have a complete chain of title properly recorded, by mesne conveyances with full covenants of warranty for said lands from the deed to said Gilbert from said Jane N. Lewis.

The value of said lands, as found by the Court, is $5,200.

In No. 1214, *Romeo Lewis et al.* vs. *Onno Dirks et al.*, the date of the bond for a deed from Jane N. Lewis to John M. Boner for the land in controversy is July 3rd, 1856; and of the deed, made in pursuance of the bond, is October 10th, 1860; that the defendants have a complete chain of title, properly recorded, from the dates of said bond and deed, under mesne conveyances, with full covenants of warranty from said Jane N. Lewis to themselves.

The value of said lands in controversy, as found by the Court, is $5,200.

In No. 1215, *Romeo Lewis et al.* vs. *Oliver M. Dye et al.*, the date of the deed from Jane N. Lewis to James F. Burnes for the land in controversy is October 30th, 1860; that the defendants have a complete chain of title, properly recorded, to said land under deeds with full covenants of warranty from Jane N. Lewis to themselves.

The value of said land, as found by the Court, is $5,625.

In No. 1216, *Romeo Lewis et al.* vs. *Celicia Boner*

et. al., the deed from Jane N. Lewis to John M. Boner, for the land in controversy is dated July 3rd, 1856; that the defendants have a complete chain of title, properly recorded by mesne conveyances, with full covenants of warranty from said Jane N. Lewis to themselves.

The value of said land, was found by the Court to be $5,200.

In No. 1517, *Romeo Lewis et al.* vs. *Celicia Boner*, the bond for a deed from Jane N. Lewis to John M. Boner for the lands in controversy is dated July 3rd, 1856; and the deed from Jane N. Lewis to said John M. Boner for said lands, in pursuance to said bond, is dated October 10th, 1850; and the defendant has a complete chain of title to said lands by mesne conveyances, by warranty deeds, from the said Jane N. Lewis to herself.

The value of said lands, as found by the Court, is $8,000.

Upon the facts in the cases submitted, three leading facts are presented:

I. THE CONSTRUCTION OF THE WILL OF ROMEO LEWIS.—The plaintiffs in error contend that under the will, Jane N. Lewis took only an estate for her natural life, and at her death in default of heirs of her body, the heirs at law of the testator, Romeo Lewis, took the estate in fee simple. This proposition is sustained by Judge BLODGETT in his opinion filed in the cases.

The contention of the defendants in error is, that the devise to Jane N. Lewis and to the *heirs of her body*, was a devise to her and her children *as a class of persons*, to take at the decease of the testator; and

that Mrs. Lewis being the only survivor of that class, at his death, took the whole. This contention was not sustained by the Court below.

II. THE TAX TITLE.—It is insisted on the part of the plaintiffs in error, 1st, That Mrs. Lewis, as tenant for life, was bound to pay the taxes on the lands in controversy during her tenancy; and she having permitted the same to be sold for taxes, and bid in for her use, and obtained an assignment of the certificate of purchase, and a tax deed to herself, the same was fraudulent and void; and she acquired no title thereby as against the remainder-men, reversioners or owners of the fee.

2nd. That it is shown by the records of Woodford County, where the lands are situated, that no judgment was ever recovered against said lands, as recited in the tax deed; and that such tax deed is, therefore, null and void as against the plaintiffs in error.

The defendants in error offered the tax deed in evidence as *Claim and Color of title* under the Statute of Limitations. They contend that, as Mrs. Lewis had a color of title of record at the time the persons, under whom they claim, purchased the lands from Mrs. Lewis, for a valuable consideration, and that such purchasers, having taken actual and visible possession in pursuance of such purchase, which possession has been continued, with payment of taxes, under deeds, purporting to convey the fee simple title to successive grantees down to the defendants in error, they have respectively acquired titles in fee under the laws of Illinois, which cannot be disturbed by the plaintiffs in error.

III. STATUTE OF LIMITATIONS.—The defendants in error seek to defeat a recovery under the Statute of Limitations of Illinois: *First*, Under section 1, Adverse Title and Possession, without notice, for over twenty years; *Second*, Under section 6, Claim and Color of Title, made in good faith, Actual Possession and Payment of Taxes for the period of seven years.

The contention of the plaintiffs in error is, that the Statute of Limitation cannot run as against them, they being reversioners, during the lifetime of Jane N. Lewis, the owner of the life estate; because during that period they had no right of entry, or to bring action.

In all the cases under consideration, His Honor, Judge BLODGETT, *held*, that the defense under the Statute of Limitations is complete. This decision of the Court below is assigned as error.

This might be regarded as the only point necessary for us to discuss in the first instance. But, inasmuch as the rulings of the Court upon the construction of the will, and other questions incident thereto, will be controverted by the defendants in error, we deem it expedient, and most convenient to consider the several proposition in the order above stated.

I.

CONSTRUCTION OF THE WILL.

The residuary clause of the will of Romeo Lewis, deceased, is as follows:

"I further give and devise to my dearly beloved wife, Jane N. Lewis, and to the heirs of her body, my houses and lots in the Town of Oxford, Butler County,

Ohio; and all the residue of my lands in the States of Indiana and Illinois, and all the rest residue and remainder of my personal estate, goods and chattels of every kind and description whatsoever, to be equally divided between them to share and share alike".

It will be observed that the lands are devised to *Jane N. Lewis, and to the heirs of her body.* The language used would, at the common law, have conferred upon Mrs. Lewis only an estate in fee tail, by which, under the Statute of Illinois, instead of becoming seized in fee tail, she became seized of an estate for life only; and the remainder at her death would have passed in fee simple to the heirs of her body, if any such persons were in existence.

Section 6, of chapter 30, of the Statute of Illinois, entitled "Conveyances", which was in force at the time of the execution of the will, is as follows :

"In cases where, by the common law, any person or persons might hereafter become seized, in fee tail, of any lands, tenements or hereditaments, by virtue of any devise, gift, grant or other conveyance, hereafter to be made, or any other means whatsoever, such person or persons, instead of becoming seized thereof in fee tail, shall be deemed and adjudged to be, and become seized thereof, for his or her natural life only, and the remainder shall pass in fee simple absolute to the person or persons to whom the estate tail would, on the death of the first grantee, devisee or donee in tail, first pass according to the course of the common law, by virtue of such devise, gift, grant or conveyance".

JUDGE BLODGETT'S CONSTRUCTION.—His Honor, Judge BLODGETT, who tried the cases at bar in the Circuit Court, in his opinion filed, after reciting the admitted facts, says:

"Upon these admitted facts, there can be no doubt that Mrs. Jane N. Lewis, under her husband's will, would have taken at common law only an estate in fee tail, which is defined to be 'An estate which is confined in its descent to the posterity of some individual, so as to cease upon failure of such posterity.' (Burton on Real Property, p. 4). So the same author says, at page 210, 'Upon a devise to a person and his issue, or children, the construction varies according to circumstances. If the party have issue, or children, at the time the devise is made, they will take estate, it seems, for their lives jointly with their parents; but if he had no issue at that time, he takes an estate tail.' But by the operation of the 6th section of chapter 30 of the Revised Statutes of Illinois, title 'Conveyances,' which was in force at the time the will in question was made and took effect, Mrs. Lewis took only an estate for her natural life; and at the death of Mrs. Lewis, in default of heirs of her body, the heirs at law of the testator, Romeo Lewis, took the estate in fee."

Definition of Estate Tail.—At common law, the estate devised by Romeo Lewis' will would clearly have been an estate in fee tail; which is defined by Bouvier to be:

"An inheritable estate, which can descend to certain classes of heirs only. It is necessary that they should be *Heirs of the body* of the ancestor. It corresponds with the *feudem talliatum* of the feudal law. The estate itself is said to have been derived from the Roman system of restricting estates."

Blackstone defines an estate tail to be:

"Tail general is where lands and tenements are given to one, *and the heirs of his body begotten*; which is called tail general, because how so often soever such donee in tail be married, his issue in general by all and every such marriage is in succesive order capable of inheriting the estate tail *per forma doni*.'

Washburn, on Real Property, (1 Washb. 72–73.) thus defines it:

"Estate Tail, an estate of inheritance, which, instead of descending to heirs generally, *go to the heirs of the donee's body*; which means his lawful issue, his children, and through them his grand-children in a direct line so long as his posterity endures in a regular order and course of descent, and upon the death of the first owner without issue the estate determines.

"In order to create an estate tail there must be a limitation in express terms or by direct reference, not only to heirs, but *to* the heirs of the donee's body.

"In all cases where the heirs of a donee in tail take the estate, they do so by descent, and not by purchase.

"It is therefore requisite, in order to create such an estate, that, in addition to the word *heirs*, there should be words of *procreation*, which indicate the body from whom the heirs are to proceed, or the person by whom begotten". See also,

Harkness vs. *Corning*, 24 Ohio St. 427–428;

Pollock vs. *Speidel*, 17 Ohio St. 439.

Statute De Donis—The Statute *De Donis* recites, by way of preamble, the custom of giving lands to a man and his wife and to the "*heirs begotten of their bodies*," with an express condition of reverter upon the failure of such heirs. Also the custom of giving lands in frank marriage, which contains an implied condition of reverter if the husband and wife die without heirs of their bodies; and also of giving land to another, and the heirs of his body issuing. It then recites the custom of aliening lands after issue born, to disinherit their issue of the land, contrary to the minds of the givers, and *contra formum in dono expressam*. It then declares in substance, that the will

of the giver, according to the form of the deed of gift manifestly expressed should, from henceforth, be observed, so that, among other things, they, to whom the land was given, under such condition, should have no power to alien the land so given; but it should remain unto the issue of them to whom it was given after their death, or should revert unto the giver or his heirs, if issue fail. (2 Inst. 332, 333; 2 Pres. on Real Est. 378).

The effect of this statute was to divide the entire inheritance into two parts, or estates, namely, the estate tail, and the reversion or remainder in fee expectant upon the failure of the estate tail. It is generally supposed to have introduced estate tail into the English law; but it would be more accurate to say that it established them there. (1 Wash. Real Prop., 95, note 2; 2 ib. 748).

The statute was considered by the Courts as a remedial one, and instead of confining it to the precise cases enumerated in it, they regarded these as put by way of example; and the effect of it was to introduce a new class of estates, or give a different quality to an old one. It was considered as designed to preserve the property and maintain the grandeur of existing powerful families, by securing to owners of estates the liberty to dispose of such parts thereof as came under the denomination of tenants, in such manner, and by such order of succession, as their own inclinations or ingenuity might devisee. (1 Blackst. Com. 116; 1 Wash. Real Prop. 95, 96; 2 ib. 748).

In *Frazer* vs. *Board of Supervisors of Peoria Co.*, 74 Ill., 282, the facts in the case were, that on Decem-

ber 30th, 1854, one Wm. S. Moss conveyed certain lots to his unmarried daughter, Harriet W. Moss. The deed recited a consideration of one dollar and the natural love and affection; and "To have and to hold the said premises, with the appurtenances, unto the said party of the second part, *her heirs of her body*, for ever." She afterwards intermarried with one Arthur H. Griffith. In June, 1865, she and her husband re-conveyed said lots to her father. The deed recited a consideration of one dollar; and that "the conveyance of the above and foregoing premises is hereby made in consideration of the said William S. Moss having, heretofore, to-wit: on the 30th day of December, 1854, conveyed, in consideration of one dollar, together with natural love and affection, to the said Harriet W. Moss, now Griffith, and before her said marriage, the above described premises, and subsequent arrangements having been made by which it is desirable to change said intended gift, (the said conveyance of said William S. Moss to the said Harriet W. Moss, now Griffith, having been intended as a deed of gift), from said premises to other property; therefore, this deed is made to re-vest the title to the said premises in the said William S. Moss, in consideration of other property received in exchange, and to the same uses and purposes, the receipt of which said property is hereby acknowledged." The daughter, at the time the stipulation was entered into, had no children, and was still the wife of Griffith.

March 15th, 1867, Moss conveyed said lots to Peoria County, with full covenants of warranty. On April 20th, 1867, the County of Peoria conveyed the same to Frazer, by deed with full covenants of war-

ranty. The suit was for a breach of covenant. It was *held*, that the conveyance of Moss to his unmarried daughter, vested in her an estate for life only, and carried a contingent remainder in favor of the heirs of her body, who, when born, would take the absolute fee; and that Moss, by his conveyance to his daughter, deprived himself of all estate *but a contingent reversion, dependent upon his daughter dying without having had issue; and that it was not in the power of the daughter, by a re-conveyance, before issue born, to defeat the contingent remainder in favor of such issue.*

The Court, at page 290, say :

"It then followed that Harriet took only a life estate by the deed from her father, and that by the deed a contingent remainder was created in favor of the 'heirs of her body', who, when born, will, under the statute, take the absolute fee. And by force of the same statute, Moss deprives himself of all estate but a *contingent reversion*, and when he conveyed to the County, nothing passed but the life estate of Harriet, which he had acquired, and this right to the expectant reversion. He had not and could not have the fee, and, hence, could not convey it to his grantee. He could, of course, convey no greater estate than he held. Should Mrs. Griffith die without having had issue, *then the title would no doubt revert to Moss, if living, or if dead, to his heirs.*"

Applying the same rule to the will of Romeo Lewis, his wife took only a life estate; and by the will a contingent remainder was created in favor of the *heirs of her body*, who, when born, would, under the statute of Illinois, have taken an absolute fee. And Mrs. Lewis, having died without issue or *heirs of her body*, the title reverted to the heirs of the original donor upon the death of Mrs. Lewis, which extinguished the life estate. Jane N. Lewis by her deeds to

the defendants, conveyed no greater interest than she possessed, which was simply a life estate, which terminated at her death—July 12th, 1888.

RULE IN WILD'S CASE.—The rule of construction commonly referred to as in the *Wild's Case*, as stated in 2 *Williams on Executors*, 937, is this:

"That where lands are devised to a man and his children, he having none at the time of the devise, the word 'children' must be taken as a word of limitation, and he shall take an estate tail; but if he has any children living at the time of the devise, the word 'children' must be taken as a word of purchase, (which it naturally is,) and they will take a joint estate with him."

In 3d Jarman on Wills, 174, it is stated, that "where lands are devised to a person *and his children, and he has no child at the time of the devise*, the parent takes an estate tail; for it is said, the intent of the devisor is maifest and certain that the children or issue should take, and as immediate devisees they cannot take, becuase they are not *in rerum natura*; and by way of remainder they cannot take, for that was not his (the testator's) intent, for the gift is immediate; therefore such words shall be taken as words of limitation. In support of this position, a case is referred to, as reported by Serjeant *Bendloes*, 1 Bulst., 219, Bendl., 30, in which the devise was to the husband and wife, "and to *the men children of their bodies begotten*", and it did not appear that they had any issue at the time of the devise, and, therefore, it was adjudged, that they had an *estate tail* to them *and the heirs male of their bodies*".

In 3d Jarman on Wills, page 187, it is said, quotting *Sir J. Romley*, that:

"Generally under a gift to a wife and her children ren, if there was nothing to denote the proportions in which they were to take, the most natural disposition

was to give the property to the wife for her life, and afterwards to her children".

But in the case at bar the estate is given to Jane N. Lewis, the wife, and to the 'heirs of her body.' As there were no heirs of her body in fact, and as there could be none in law until after her death, it necessarily follows that whether you use the words 'heirs of her body' in its legal sense. or as meaning children, or issue, or decendents, it means persons who take an estate after her death.

"No person is heir of a living person". (1. Bouv. L. D., 746.

In the matter of *Sanders and others*, 4 Paige Ch. R., 293, it was held, that where, by the terms of the will, an estate is given to a man and his children, if he has children at the time of the devise, he takes a joint estate with the children; but where there are no children *in esse* at the time of making the will, the term children in such a devise, may be construed as a word of limitation.

In *Nightengale* vs. *Burrell*, 15 Pick., 104, the devise was this: "I give to my daughter M and her children one-half of my house and lands. I give to my daughter J and her children the other half; but if either of my daughters should die leaving no issue, my will is that my surviving daughters and their children should enjoy their deceased sister's part".

The daughter M was unmarried at the time of making the will. J was then married, but it did not appear whether she had any child. The Court held that J took an estate tail.

In the opinion the Court say:

"A devise to one and his children, *he having no children at the time*, is *equivalent to a devise to him and his issue, and creates an estate tail.*"

"*If J had no children at the making of the will, the point is beyond doubt, that the words constitute an estate tail in her.* But if she had a child at the time, we are of the opinion, that taking the whole will together, the word children must be deemed a word of limitation, and not a word of purchase."

This case is precisely in point, and many authorities are cited in the opinion to sustain it.

See 1st Leading cases Amer. Law Real Pr., 200; and *Wood* vs. *Griffin*, 14 N. H., 231

In *Goss* vs. *Everhart*, 29 Ga., 545, it was held, that: "The use in a devise of the word *children*, in connection with the words 'heir of the body', has often the effect of destrying what would otherwise have been an estate tail, and rendered it a life estate."

The Court further say, in the opinion, that:

The employment of the term heirs, therefore, indicate, that the children were not to take the present estate, but one that should come to them after the death of their mother."

"A devise to one and his children, there being a child or children living at the time of the devise, will be held to give a life estate to the devisee, with remainder in fee to the children as a class; so that after born children will be entitled to share equally in remainder with those already in existence."

Hannar vs. *Osborn*, 4 Paige, Ch., 336;

1 Leading Cases Am. Real Prop., 201.

In *Nightengale* vs. *Burrell*, 15 Pick., 104, the Court say:

"The words 'heirs of the body' necessarily imply

that they take after the death of the first donee; for it is a maxim of the law *nemo est haeres viventis*. And this is certainly true, where there are no children either at the date of the will or the death of the testator."

It is clear, then, that as the words 'heirs of the body' are used, and as there were no children *in esse* when the will of Romeo Lewis was made, nor at the death of the testator, that no estate *in presenti* was given or was intended to be given to them; and hence the claim of the defendants is without foundation on that point.

In *Summers* vs. *Smith*, 127 Ill., 646, it was held, 1st, That there are no estates tail in Illinois; but on the contrary, where an instrument is executed which would at common law be held as creating an estate tail, the statute declares it shall vest only a life estate in the grantee or donee in tail, and the remainder in fee in the designated heir or heirs; 2nd, That in the absence of anything appearing to the contrary, language used in a will must be presumed to have been intended to have the legal effect which the law assigns to it. So language used, which, at common law, would create an estate tail, must be held to give a life estate in the first taker, and a fee in the heirs.

Romeo Lewis by his will intended to enlarge his widow's rights, by giving her an estate for life in his valuable improved real estate in Oxford, and his lands in the States of Indiana and Illinois. But he being then only 47 years, and his wife but 34 years of age, he expected to have children by her, and in fact one child was born to them after the will was executed. He made provision for his anticipated children by giv-

ing the remainder to the *heirs of her body*. It is true, that if Mrs. Lewis had no children by the testator, and that if, after his death, she had remarried, and had children by a second husband, at her death, they would have come in as *heirs of her body*. The testator did not anticipate so many contingencies,—in fact they did not occur. He was then in the prime of life, and his wife was still a young woman and capable of bearing him many children. It was in expectation that they would have children, and he made provisions for such.

The case of *Sisson* vs. *Seabury*, 1 Summer U. S. Cir. C. R., 235, is, in all material respects, similar to the case at bar. It was there held, that where a devise to "A and to his male *children*, lawfully begotten of his body, and *their heirs* forever, to be equally divided amongst them and their heirs forever," passed a life estate to A, with a contingent remainder in fee to his children, he having, at the making of the will, no children.

Judge STORY, in a very elaborate opinion, in which he reviews the decisions of the courts of England upon the questions presented, says:

"The principal question in this case turns upon a devise in the will of Thomas Sisson, made in 1775. It is in the following words: "Item, I give and bequeath to my loving grand-son, Philip Sisson, all my homestead farm * * * to him, my said grand-son, Philip Sisson, *and to his male children lawfully begotten of his body, and their heirs forever, to be equally divided amongst them and their heirs foreever.*" The testator died in 1777, leaving the said Philip Sisson a minor under age, without children, not then having been married. The question is, what estate he took under the will. If he took an estate tail, it has been

docked by a conveyance duly made by him according to the statute of Rhode Island for barring estates tail. If he took an estate for life only, and his children, afterwards born, took a fee in remainder, then the plaintiffs are entitled to recover the premises, unless they are barred by the warranty of their ancestor in the conveyance, by which he docked the entail.

"The case has been very thoroughly argued; and is certainly not without difficulties, when viewed in connection with the authorities. The general rule is, that, in construing wills, the intention of the testator is the pole star to guide and govern the Court. But this rule carries us but a very little way; for the inquiry still remains, what that intention is, and how it is to be ascertained. Now, the intention is to be sought for, not only by consulting the words of the will, and the posture of the facts, which must have had an influence when it was framed, and constituting, if one may so say, a part of the *res gestae*; but also by the rules of interpretation, in some measure artificial, which have been from time to time adopted by courts of law for the ascertainment of the intention. Where such rules have long prevailed, it would produce infinite mischiefs to depart from them; for it would necessarily loosen the whole foundation of the titles to real estate, and unsettle all that constitutes safety or security in the administration of the law; I mean, the adherence to precedents. And then, again, not only rules of interpretation, but expositions of certain phrases, found in certain connections in wills, are entitled to great influence in deciding other cases similarly circumstanced. In short, precedents constitute the material basis of this department of the law; as well as of others, in regard to the mode of searching out and fixing the intention of the testator. So that it may be truly affirmed, though it seems, at first view, somewhat paradoxial, that the intention, as expounded by courts of law, is, or may be often quite different from the private intention and understanding of the testator.

"The difficulty of construing wills in any satisfactory manner, renders this one of the most perplexing branches of the law. The cases almost overwhelm us at every step of our progress; and any attempt even to classify them, much less to harmonize them, is full of the most perilous labor. *Lord Eldon* has observed, that the mind is overpowered by their multitudes, and the subtlety of the distinction between them." *Jesson* vs. *Wright*, 2 Blight. R., 50.

Judge STORY, at page 240, further says:

"I shall confine my remarks chiefly to the direct devise; for although the other clauses in the will may furnish some illustrative lights, they do not seem to me strong enough to lead to any decisive conclusion. Two facts, however, are important to be mentioned: one is, that the testator professes an intention in the introductory part of his will, to dispose of all his wordly estate; and there is no residuary clause. So that he must have supposed himself to have made a final disposal of all his estate, in the special devises. Another fact is, that the devisee, Philip Sisson, was a minor, unmarried and without children, at the time of making the will, and at the death of the testator.

"Let us then proceed to the words of the will. The first part of the clause is: 'I give and bequeth unto my loving grand-son, Philiy Sisson, etc., and to his male children, lawfully begotten of his body,' etc. If the will had stopped here, there could not have been a doubt, either upon principle or authority, that it was the intention of the testator to create an estate in tail male in the devisee. In the first place, the words import a devise *in presenti*, and as the devisee had no children at the time of the will, if we construe the words, 'his heirs male,' etc. as words of purchase, and a *designatio personarum in presenti*, the devise becomes utterly void, from the want of proper objects *in esse* to take; so that the intention of the testator is defeated. On the other hand, if they are construed, as words of limitation, designating the succession of heirs to the estate, full effect is giving to the words of the

will, and the intention of the testator is accomplished. *Ut res magis valeat, quam pereat*, the latter construction ought to be adopted. This is exactly in conformity to one of the resolutions in *Wild's case*, (6 Co. Rr. 17,) which was decided by all the Judges in England. "This difference," says my Lord Coke, "was resolved for good law; that if A devises his land to B, and to his *children* or *issues*, and he hath not any issue at the time of the devise, that the same is an estate tail; for the intent of the devisor is manifest and certain, that his children should take; and as immediate devisees they cannot take, because they are not *in rerum natura*; and by way of remainder they cannot take; for that was not his intent, for the gift is immediate. Therefore, such words shall be taken as words of limitation, *sciliset*, as much as children or issue of his body." Now, *Wild's case* has constantly been admitted to be good law; and relied on in many subsequent cases. The present case is even stronger than the resolution in *Wild's case;* for the words implied there, 'lawfully begotten of his body,' are here expressed.

"The whole difficulty is upon the succeeding part of the clause, 'his male children, etc., *and their heirs forever*, to be *equally divided* amongst them and *their heirs forever*.' Now, certainly, in construing the words of the devise, we must take the whole together; and as the former words may be enlarged by the latter, so they may also be restrained and qualified, or explained, by the latter. We are not bound to give an absolute technical sense to one part of the language and then reject all other parts, as inconsistent with it. *Lord Chief Justice Wile*, (and he was a very great judge), remarked with great force and sagacity, that a 'mistaken notion has prevailed, that particular words in a will are as much technical words, as others are in a deed; and as necessarily pass such an estate in a will, as others do in a deed; as, for instance, that the words, *issue* or *children*, where there are none at the time of the devise, do as necessarily create an estate tail in a will as 'heirs of the body' do in a deed; and he then

added, that much confusion, in respect to the construction of wills, had been occasioned by this mistake.

"Now, the obvious sense of these words of the devise taken in connection is that all the male children of the devisee, Philip Sisson, are to have equal shares in the devised premises in fee simple. The devise is to the '*male children and their heirs* forever,'—the very words which are expressive of a fee simple; and the premises are to be equally devided among them, (that is, among the male children), and their heirs, which are equally expressive of an equality of shares in the inheritance.

"If this be the obvious sense of the words, and the intention of the testator, the next inquiry is, whether it can be carried into effect by the rules of law. Certainly it can be, if we construe the whole clause to be a devise to Philip Sisson for life, with a contingent remainder in fee simple to his children, as purchasers, share and share alike. And it can be accomplished in no other manner. Upon this construction the remainder would be a contingent until the devisee should have a male child born. It would then vest in him in fee, and be open to let in any after-born children in the life of the father. In this way the inheritance would go exactly in the line, and in the shares, marked out by the testator.

"Why, then, should not this construction be given to the clause? It is repugnant to no words of the will. It conforms to the apparent intention of the testator. It satisfies the rules of law. If, on the other hand, we construe the devise as giving a fee tail to Philip Sisson, the whole of the words succeeding the first part of the clause are to be struck out of the will. They are repugnant to an estate tail in Philip Sisson. His male children cannot, if he takes an estate tail, have a fee simple, and they cannot take equally. On the contrary, the eldest son and his issue are to take the whole. The only possible objection to it is, that if Philip Sisson should have children, all of whom should die in his lifetime, leaving issue, the issue

could not take under the will. But this is no more than what may occur in every other case of a lapsed devise."

In support of the interpretation given by Judge STORY in the *Sisson case*, he refers to the following as being most directly in point:

"In *Loddington* vs. *Kime*, 1 Ld. Raym. 203, the words of the devise were, to A *for life*, and in case he should have any issue male, then to such *issue male and his heirs forever*; and if he should die without issue, male, then to B and his heirs forever. And it was held, that A took an estate for life only, with a contingent remainder in fee to his issue male. Here indeed, the words, for life, were inserted; but as there was a devise over, those words alone would not have prevented A from taking an estate tail. The effective ground of the determination was upon the superadded words, 'issue male and his heirs forever.' Lord *Raymond* says that the Judges held, that the testator designed the words, issue male, to be a description of the person, 'because (he added), of the further limitation to the issue namely, and to the heirs of such issue forever.'

"In *Doe* vs. *Leming*, 2 Burr. R., 1100, the devise was to *A, and the heirs of his body lawfully to be begotten*, as well females as males, and to their heirs and assigns forever, *to be divided equally, share and share alike*; as tenants in common, and not as joint tenants. It was held, that A took an estate for life only, and that the heirs of her body were entitled to a fee as purchasers. The Court relied upon the superadded words, as unequivocal, to show the intention of the testator."

The case, as remarked by Judge STORY, is directly in point with the case of *Sisson* vs. *Seabury*; and is as directly in point with the present case of *Romeo Lewis' will* as can well be imagined. There were no words limiting the estate to A for life. In one

respect it was stronger; for the testator had used the words, 'heirs of her body,' exactly as was done in the will of *Romeo Lewis*, which are, as the Court held, peculiarly appropriate to an estate tail; and, yet, upon the plain force of the superadded words, those words were withdrawn from their natural meaning, as words of limitation.

Sisson vs. *Seabury*, the words are 'male children,' which, as Judge STORY holds, as contradistinguished from 'heir of the body,' naturally import words of limitation.

"Unless, indeed, (as Judge STORY remarked) this case of *Doe* vs. *Leming*, can be overturned, and it has never yet been overturned, I for one, do not see, how the present case can be differently decided."

Applying the pertinent remark of Judge STORY to the present case, the construction put upon the will of Romeo Lewis by his Honor, Judge BLODGETT, is unquestionably the correct one.

In *Jeffry* vs. *Honeywood*, 4 Madd. R., 398, the devise was to A, and to all and every *the children*, whether male or female, of her body lawfully issuing, and unto *his, her and their heirs* as *tenants in common*. It was held, that A took for life only, with remainder to her children as tenants in common in fee.

Judge STORY concludes his examination of authorities in support of his opinion in the *Sisson case*, as follows:

"Now, I believe, that no case whatsoever will be found to have decided, that where the devise has been in terms *to children and their heirs*, without any devise over, the parent shall take an estate tail. Where the words of the devise have been to '*issue*, or *issue of the body*,' and *their heirs* or *heirs of their bodies*, it has

often been held, that the parent took an estate for life only. In addition to the cases already cited on this point, are *Backhouse* vs. *Wells*, (1 Eq. Cas. Abrid.; S. C. 2 Str. R., 731, 800;) *Mandeville* vs. *Lackey*, (3 Ridg. P. C., 352;) *Merest* vs. *James*, (1 Brod. & Ring. R., 483; S. C. 4 Moore R. 327."

In *Carr* vs. *Estill*, 16 B. Monr. (Ky.) R., 309, where a testator devised 'to Mary Baker Didlake and her children' a tract of land; at the time of the devise, the devisee, Mary, had no children; she afterwards had one child; it was held, that she took an estate for life, and the child the remainder.

In the opinion, the Court say:

"It has been observed that the words of the devise, abstractly and literally, import an immediate gift, not only to the devisee in being, but to those not in being. But there being no children *in esse* at the time of the devise, it could not have been the intention to give an immediate estate to them, for that were impossible. And as the words of the devise, as conceded by all the authorities, manifest a clear intent that the children shall take, the only consistent and rational construction is, that the testator intended the devisee, in being at the time, should take a life estate, remainder to the children."

"It necessarily results that as the children must take under the devise, if effect is to be given to the intent, and as it is impossible for them to do so *in presenti*, they must take *in futuro*.

In *Hill* vs. *Thomas*, 11 South Carolina R., 346, the Court quotes very fully, and approvingly, from the opinion of Judge STORY, and say: "*Sisson* vs. *Seabury*, is recognized authority, and supported by a long array of the decisions of the English courts."

In the South Carolina case, just cited, the devise was as follows:

"I give and bequeath to my son G * * * the land whereon I now live * * * Now the condition of the above gift is that the property * * * both real and personal is to remain the said G's and his child or children, and in case the said G should die, and not leave any child or children, why then the said property is to go to,' etc. G having one child at the death of the testator, in was held, to be a life estate in G with remainder to his children as purchasers.

In *Butler* vs. *Huestis*, 68 Ill., 194, Mrs. Butler had died in 1865, testate. By the 4th paragraph of her will she gave and bequeathed to Altieri A. Huestis the property involved in that ligitation, with the use, possession, rents and profits during her natural life, "*the reversion and fee thereof to the heirs of her body at and after her decease!*'

The Court, in its opinion, at page 598, say:

"The difficulty in the case arises out of the use the of words in the will, the *heirs of her body*. The argument is, the words *heirs of her body* are words of limitation, and not of purchase, as child, children or issue. In accordance with the maxim, *nemo est haeres viventis* the living children are only heirs expectant, and hence no one can take an estate under that designation while the ancestor is living. It is insisted these are words of limitation, within the rule in Shelly's case. If they could be treated as meaning children of Mrs. Huestis, then they would be words of purchase, and all difficulty in the case would be avoided. *Mrs. Huestis*, under our statute, would take a life estate in the property and the remainder would pass in fee simple absolute to her children, although it might open to let in after-born children, and be divested as to such as should die before the determination of the life estate.

"Prior to the statute *de donis*, the estate given to Mrs. Huestis, by the terms employed in the will, was a conditional fee, and on the birth of issue the right

of alienation would attach. Since the enactment of that statute, it is an estate tail, and in case of the failure of *heirs of the body*, it will revert to the donor, his heirs or appointees."

Further on the Court, in the same opinion say:

"It is apparent, therefore, the estate devised was not an estate tail. It was simple a limitation of the fee to her heirs, and hence the rule in Shelly's case could be applied. But not so in the case at bar, for here the estate is devised in tail. The statute in this State has saved the entail to the first degree. It is palpable, therefore, so far as estates tail are concerned, the rule in Shelly's case has been repealed by the 6th section of the Conveyance Act. It is immaterial whether, under our law there is such an estate, strictly speaking, as an estate tail, answering to the common law definition; but the statute provides a life estate to the first taker, with the remainder to the second taker in fee simple absolute, which is an estate tail, although limited to the first degree. Therefore, it is absurd to say, under the rule in Shelly's case, notwithstanding our statute to the contrary, the first taker will take the whole estate in opposition to the expressed intention of the donor."

At page 601 of the same opinion, the Court say:

"The words, *heirs of her body*, as employed in the will of Mrs. Butler, may, with great justness, be regarded as words of description, as simply designating the children of Mrs. Huestis, as the persons who should take the fee of the estate, and notwithstanding the fee may vest immediately, the enjoyment is postponed until *'at and after her decease.*" See also,

Carpenter vs. *Van Olinder*, 127 Ill. 49.

In *Blair* vs. *Vanblarcum*, 71 Ill., 290, the father of Mary Vanblarcum died testate, leaving her as his only child. The second clause of his will is as follows:

"I will, bequeath and devise unto my daughter, Mary Gamble, and to the heirs of her body, and to

their heirs and assigns, all my real estate, of whatever description, and wherever situated; and in case the said Mary Gamble shall die without issue, then the real estate hereby willed, bequeathed and devised unto her, shall go and descend unto my brothers and sisters, and to their heirs and assigns in equal proportions."

Subsequently Mary Gamble intermarried with Jacob C. Vanblarcum; and they filed a bill, claiming that the will vested in Mary Vanblarcum an unconditional fee simple title to the lands of which the testator died seized; that the limitation over to the heirs of her body, and in case of her death without issue, then to the brothers and sisters of the testator, is inoperative and void at law; but operates as a cloud upon her title. The bill prayed for a construction of the will; and that the conditional limitation over be declared void; and that Mary be decreed the owner in fee simple absolute.

It was *held*, that Mary Gamble took under the devise a simple life estate, with a remainder over to the heirs of her body in fee simple absolute; and that the limitation to her heirs was valid and binding.

The Court, in the opinion, after quoting the 6th section of the Conveyance Act, say:

"This enactment, then, has unmistakably defined Mrs. Vanblarcum's interest, under the devise in the will of her father, to be a simple life estate, with a remainder over to the heirs of her body in fee simple absolute. Hence that limitation is valid and binding, both under the common law and this statute, and the limitation to the heirs is vilid and binding.

"At the common law, before the statute *de donis*, when such a conveyance was made, and the grantee died without issue, the estate reverted to the donor.

And such would, no doubt, be the case under this devise, unless its course is changed by the further limitation over to the brothers and sisters of testator. As to whether that limitation is too remote to be enforced, we decline to consider, inasmuch as the contingency on which they can take may never occur, as the devisee may, now or hereafter, have *heirs of her body*, who will take the absolute fee in remainder."

In *Cooper* vs. *Cooper*, 76 Ill., 57, where a deed to A and B, husband and wife, contained the following granting clause: "Have granted, bargained and sold, and by these presents do grant, bargain and sell unto the party of the second part, and their assigns, with power to sell the same, during the life of the said A, and to his wife, B, after the death of her husband, A, during her widowhood, and after her death, or after she ceases to be the widow of said A, to the heirs of A on the body of said B begotten, certain tracts of land." etc. It was held, that A took a life estate, with power to sell and convey the fee; and B a conditional life estate after the death of A, liable to be defeated on her remarriage; and that the heirs of A, begotten of the body of B, before or after the grant, took the remainder in fee simple absolute.

In that case, the *habendum* was 'unto the said party of the second part, their heirs and assigns forever.' It was *held*, that the husband and wife took, each, an undivided half in fee as tenants in common; and that upon the husband's death, his portion desended to his heirs at law, subject to the dower of his widow; and that the words 'heirs of the body of the wife' must be rejected as surplusage, there being no apt words to limit an estate to the heirs of the wife's body.

In the opinion, at page 65, the Court remark:

"But the question arises, whether the heirs of the body of Sarah Cooper became purchasers and took with the parents. They are named by that general description as being of the parties of the second part. But it is a familiar rule of law that the living have no heirs. Persons may be living who, on the death of a person, may become his or her heirs, but they are not, nor can they be until the person shall die. Then there was no person in being that could answer to that description when the deed was made, nor are there yet such person. She not being dead, has no heirs of her body; she has children, but no heirs. She, for aught that appears, may then have had children, and others may have since been born of her body, but the deed does not name children of her body. We must therefore hold that these words are inoperative as they would have been had a dead or fictitious person been named as a grantee.

"To render a deed valid, there must be proper parties capable of contracting, and they must contract. But here, there is an attempt to convey an interest to persons not then in being, and who may never be. The utmost that could be contended for would be, that an undivided half of the property conveyed passed to Mrs. Cooper for life, and in remainder to the heirs of her body. But that cannot be so, inasmuch as no apt words were employed to limit such an estate. Nor are they so mentioned in the granting or *habendum* clause. We must reject these words as surplusage, and hold that William Cooper and Sarah A. Cooper were the parties of the second part, and each took an undivided half of the property conveyed by that deed, in fee. And the Court below erred in refusing to partition the undivided half of the lands conveyed by the King deed to the heirs of William Cooper, deceased, under the Statute of Descents; and in not assigning to the widow her dower in that undivided half of these lands."

In the *City of Peoria* vs. *Darst*, 101 Ill., 609, the father of two illegimate children conveyed real estate

to their mother for the term of their natural lives, with remainder to his two children in fee simple, as joint tenants—that is to say, the mother to have a life estate in the property, and at her death the fee simple to vest in the children or in the survivor of them; with this further clause immediately following: 'If, however, both of them should die before the termination of the mothers estate, and to leave no child or children, then at the death of the mother, the title to vest in the City of Peoria, for the benefit of orphan children,' etc. It was *held*, that the grant to the children was not a vested remainder; but that they took a contingent right only, depending upon the event of both, or one of them, surviving the mother, or having issue; and they both having died in the lifetime of the mother, leaving no issue, that the title, on the death of the mother, vested in the City of Peoria.

RULE IN SHELLY'S CASE.—*Shelly's case* arose in the 23rd year of the Reign of Elizabeth, about the year A. D. 1579; and is reported in 1 Coke; wherein, among other rulings, it was *held*, that where an ancestor takes an estate of freehold and in the several gifts or conveyances, the estate is limited, either mediately or immediately to his heirs, either in fee or in tail, the heirs are words of limitation of the estate, and not words of purchase.

In *Perrin* vs. *Blake*, 4 Burrows, 2579, (3 Greenl. Cruise on Real Property, 313), the rule is expressed with great precision by Sergeant *Glynn* to be "in any instrument, if a freehold be limited to the ancestors for life, and the inheritance to his heirs, either mediately or immediately, the first taker takes the whole estate; if it be limited to the *heirs of his body*, he

takes a fee tail; if to his heirs, a fee simple. The words 'heirs', or 'heirs of the body', in such case, are words of limitation, and not of purchase." See

Brislain vs. *Wilson*, 63 Ill., 173;

Budlain vs. *Huestis*, 68 Ill., 594;

Carpenter vs. *Van Olinder*, 127 Ill., 47.

This rule has been the subject of much comment. *Preston*, in his work on Real Estate, gives it as follows:

"When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons, to take in succession from generation to generation, the limitation, the heirs, entitles the ancestors to the whole estate."

"If the limitation be to the *heirs of the body*, he takes an estate tail; if to heirs generally, a fee simple."

2 Bouv., L. D., 635.

In Illinois, as at common law, the rule in *Shelly's Case* is not a rule of interpretation, *but a rule of property*; and the question of intent, in determing whether it is applacable in a given case, does not turn upon the quantity of estates to be given to the ancestor, but upon the nature of the estate intended to be given to the heirs. Under the rule, all devises of legal estates wherein lands are given to a person for life, or for a greater estate, with an immediate remainder to the *heirs*, or *the heirs of the body*, will operate as words of limitation, and give the devisee an estate in fee simple, or in fee tail. The language of the opinion in *Belsley*

vs. *Ingle*, 107 Ill., 182, seems to hold a different constuction of the rule, but the Court say: "This language of the opinion was unadvisedly assented to by a majority of the members of the Court, and is now disapproved and overruled."

Carpenter vs. *Van Olinder*, 127 Ill., 42;
See *Baker* vs. *Scott*, 62 Ill., 86.

In *Carpenter* vs. *Van Olinder*, 127 Ill., 42, the Court held, that, although a testator, in making a devise of real estate, may have intended that the devise shall take only an estate for life, yet, if he afterwards gives an estate to the heirs of the life tenant, or to the *heirs of his body*, the law will contravene his intention, and vest in the devisee the remainder of the estate or the fee.

The principle applicable here is clearly and forcible stated in Hay's Principles for Expounding Dispositions of Real Etate, 96, (7 Law. Lib. 52), thus:

"The requisite limitations to the ancestor and his heirs being found, the rule must be applied. It can never be a question whether the rule shall be applied or not. We might as well be asked whether a testator intended to contravene the rule against perpetuities. It will no more yield to individual intention than any other fundamental law of property. The rule admits of no exception."

To the same effect is *Bender* vs. *Fleurie*, 2 Grant's Cases, 345, where the testator gave to his daughter certain land, in these words: "*She shall have it as her own during her life, and then it is to come to the heirs of her body for their own use.*" And the Supreme Court of Pennsylvania said:

"But it is said, the testator did not mean to give

her an estate tail. Perhaps he did not. But he has used words which, in law, mean nothing else. If he intended to give but a life estate *voluit non dixit*, we must take what he said, not what he meant. * * * But no court, in this State or in England, has ever treated the phrase, 'heirs of the body,' as words of purchase, when they are used with reference to the issue of a devisee to whom a life estate is given. They are words of limitation, and, as such, they create an estate tail in the first taker, which cannot be cut down, even by the clearest desire that it shall be a life estate only."

In *Hileman* vs. *Bouslaugh*, 13 Penn. St., 344, the Court, in speaking of the rule in *Shelly's Case*, say:

"The requisite limitations to the ancestor and his heirs being found, the rule must be applied. It can never be a question whether the rule shall be applied or not; whether the author of the limitation intended it to be applied or not." Again: "The question on a will is not whether the testator intended that the rule shall not operate,—for this is not subject to his power,—but whether he used the words, 'heirs of the body,' as synonymous with the word 'children' or its proper equivalent."

WAS THE DEVISE TO A CLASS?—The contention of the defendants in error is, that the devise to Jane N. Lewis, and to the heirs of her body, was a devise to her and her children, *as a class of persons* to take at the decease of the testator, and that Mrs. Lewis, being the only survivor of that class, at his death, took the whole.

Such a construction of the will would be in direct conflict with the well recognized rule laid down in the *Wild's case*, *Doe* vs. *Leming*, *Sisson* vs. *Seabury*' *Frazer* vs. *Board of Supervisors*, and the long list of

English and American decisions which we have cited. It seems to us to be too well established by both authority and reason, that the only construction to be given to the will, as held by Judge BLODGETT, in the cases at bar, is that it devised to Mrs. Lewis an estate tail at common law, which by the operation of the statute of Illinois, is declared to be a life estate to her, and the remainder to the heirs of her body; and in default of heirs of her body; the heirs at law of the testator, Romeo Lewis took the estate in fee simple absolute. No case can be found where a different construction of a will or deed of this character has been given.

The language of the will is, "*To* my dearly beloved wife, Jane N. Lewis, and *to* the heirs of her body." The significance of the preposition "*to*" is illustrated in *Jeffrey* vs. *Honeywood*, 4 Mad., 398, where there was a devise '*to*' A, and '*to*' the children of her body lawfully issuing, and unto his, her or their heirs forever, as tenants in common. A died in the lifetime of the testator, leaving ten children. It did not appear whether any children were living at the date of the will. The question was whether A took a fee in the one-eleventh share which would lapse. Sir J. *Leach* V. C., held that A had a life estate only. He says:

"There are two gifts, one '*to*' the mother, without words of limitation superadded, and another '*to*' her children, their heirs and assigns; and these two gifts can only be rendered sensible by construing, as the words import, a life estate *to* the mother, and a remainder in fee *to* the children."

We insist that the heirs of her body, if there were such, do not take with Mrs. Lewis as tenants

in common, or as a class. Because the plain language of the devise, and its grammatical construction clearly show that there was a gift *to* the wife, and a gift "*to* the heirs of her body,"—that these gifts were separate; —that the words, "to be divided equally between them," refers solely to the last—that is, the devise to the *heirs of her body*.

This was the construction put upon almost identically the same words, by Judge STORY, in *Sisson* vs. *Seabury*, 1 Sumner, 235; by the Court of Appeals of Kentucky, in *Carr* vs. *Estel*, 16 B. Monroe, 309; in *Hannan* vs. *Osborn*, 4 Paige Ch. R., 336; in *Doe* vs. *Leming*, 2 Burr, R., 1100; *Doe* vs. *Burnsall*, 6 Tr. R., 30; in *Bancroft* vs. *Strawm*, 67 Ill., 28; in *Story* vs. *Goff*, 11 East., 668; in *Nightengale* vs. *Burrell*, 15 Pick., 104; and in *Goss* vs. *Eberhart*, 29 Ga., 545; and other cases cited.

It will be observed *that in none of these cases were there word's limiting the estate to the first taker for life*; and yet the Courts held, that they would so construe the words, that the first taker should only have a life estate, and those described as heirs of the body should take as a class, an estate in remainder after the death of the first taker. No case can be cited giving a different construction to those words.

Redfield, in his Work on Wills, devotes about 27 pages to the subject of "Legacies to a Class," (2 Vol. 1, Chap. 1, Sec. 2). He speaks of "children," "grandchildren," "issue," "nephews," "nieces," "cousins," "brothers," "sisters," "descendants," etc., as constituting a *class*. But they must, to constitute a class, be of the same general character, and bear a common

relation to each other. The "heirs of her body," (if the words are used as children), constitute a class by themselves. The wife is an individual, and belongs to no class. The children are related to their father by consanguinity, the wife by affinity. Jane N. Lewis was entitled to a life estate, and the heirs of her body to the remainder. When Romeo Lewis died, in 1843, the children, if he had any, would have been his *heirs* his widow was not an *heir*, and could not have inherited anything. As widow, she had her dower, but as heir, she had nothing in her husband's real estate. Her husband's brother would have come before her as heir. Why then say, that the widow and children would constitute a class?

Jarman, in his Work on Wills, Vol. 1, p. 534 *269) says:

"A number of persons are popularly said to form a class, when they can be designated by some general name, as 'children,' 'grand-children,' 'nephews;' but, in legal language, the question whether a gift is one to a class depends, not upon these considerations, but upon the mode of the gift itself, namely, that is, a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportion, the share of each being dependent for its amount upon the ultimate number of persons. Thus, a bequest of £1000 to the children of A, the eldest child to take a moiety, the younger children the other moiety, is, in ordinary language, a gift to one class of persons, namely, children; in the legal acceptation of the words it is a gift, partly to an individual, namely, the eldest child of A, and partly to a class, namely, his younger children."

Where a testator, whose widow being dead, had two children,—a daughter still living, and a son, who

died before the testator, leaving children,—after making special bequests, the will directed that *the remainder of his estate be divided equally among* his "heirs at law." It was held that his '*heirs at law*' took as a class, *per stirpes*, and not as *per capita*; giving one-half of the remainder of the estate to his daughter, and to the heirs of his deceased son, the other half. It will be observed that the devise of the remainder of the estate after the determination of the life estate first created, *is to a class of persons*,—that is, to the "heirs at law" of the testator. To ascertain who are included in the class designated as '*heirs at law*,' reference must be had to the Statute of Illinois regulating descents and distribution of estates. And when the Statute is invoked to ascertain the persons who take a devise or bequest by a general description, its provisions as to the share each shall take must also be observed.

Kelly vs. *Vigas*, 112 Ill., 242;

Richards vs. *Miller*, 62 Ill., 417;

Doggett vs. *Stock*, 8 Metc., 450.

In such case the estate devised will be divided among his heirs, as in cases of intestacy.

But where there were no children living, either when the will was written or when Romeo Lewis died, or when Jane N. Lewis died, *the authorities are unanimous that there cannot be a joint devise to the wife and the children as a class.*

Where there is a bequest to take effect after the expiration of an intervening estate, also created by the will, after-born children will be held entitled where

the gift is to children as a class. (*Annable* vs. *Patch*, 3 Pick., 360). WILDE, J., here said:

"The children of her body 'meant all the children she might have.' This will not appear to be a strained construction of the words, when it is observed that as to part of the property the devise was prospective, it being of a remainder after a life estate to the widow."

2 Redfield on Wills, 11, * * 331–332;

Handberry vs. *Doolittle*, 38 Ill., 206.

In considering this question, the Court will observe that the Statute of Illinois, declares that

"No estate in joint tenancy, in any lands, tenements or hereditaments, shall be held or claimed under any grant, devise or conveyance whatsoever, heretofore or hereafter made, other than to executors, and trustees, unless the premises therein mentioned shall expressly be thereby declared to pass, not in tenancy in common, but in joint tenancy; and every such estate, other than to executors and trustees (unless otherwise expressly declared as aforesaid), shall be deemed to be in tenancy in common."

1 Starr & Curtis' An. Stat., 571;

See *Cheeney* vs. *Teese*, 108 Ill., 473.

In all the cases to be found, where the Courts have directed an equal division between the wife and the children, it will be seen that the children were *in esse* at the date of the will, or at the date of the testator's death.

In *Handberry* vs. *Doolittle*, 38 Ill., 206, the Court say:

"It is a well settled rule in the construction of wills, that where there is a devise to a *class of persons*, as to the children or issue of A, and the estate is to come into possession of the devisees immediately upon

the death of the testator, those persons of the class who are in being at the death of the testator, will take the devise, to the exclusion of those thereafter born. But if the will carves out a particular estate, which intervenes between the death of the testator and the period of distribution of the estate devised to the class, then all persons belonging to such class at the time the estate is divided, are included, though born after the death of the testator. 2 Jarmon on Wills, 75, 76; Powell on Devises, 303; *Annable* vs. *Patch*, 3 Pick., 360; *Jenkins* vs. *Treyer*, 4 Paige, 47."

Our contention is, that under the will an estate for life vested in Jane N. Lewis immediately on the death of the testator, with the remainder to the "heirs of her body;" that, to enable the issue to take, it was not required that they should be *in esse* at the date of the will, or at the date of the death of the testator; that it could not then be known whether Mrs. Lewis would have heirs of her body or not; that this was a contingency that might or might not happen; and that during this uncertain contingency, and until her death, the fee remained suspended or in abeyance; and she, not having issue of her ~~her~~ body, the plaintiffs, at her death, became vested with the fee as heirs at law of Romeo Lewis.

WHEN AND WHERE DID THE FEE VEST?—Counsel for the defendants contend, that in any event, the defendants, by mesne conveyance from Mrs. Lewis, are entitled to two-thirds of the lands in controversy.

In their brief in the Court below, defendants' counsel insisted, and we anticipate that they will claim here, that "If the Court should conclude that Romeo Lewis did not intend his wife to share his estate, at

his death, equally with the children that might be born to them, but, on the contrary, intended an estate tail or life estate to his wife, and remainder to his children, then the dying of the after-born child, before the testator, rendered the real estate intestate, under Rev. Stat. Ill. 1845—Wills Sec. 14; and gave Jane N. Lewis one-half of the real estate in fee, as heir of Romeo Lewis, and one-third of the other half as the devisee of Mary Lewis, heir of George Lewis."

The question presented by the contention of the defendants is this: Did the fee in the lands vest in the heirs of the testator at his death until the death of Jane N. Lewis, or did it rest in abeyance until that period?

The importance of that inquiry is this: The plaintiffs are the sole heirs at law of Romeo Lewis, surviving at the time of the death of Jane N. Lewis. The plaintiff, Romeo Lewis, Jr., being the sole representative heir of one brother of the deceased Romeo, and the children of Maria Saunders, plaintiff, being the sole representative heirs of another brother; and if the fee was in *abeyance* during Mrs. Lewis' life, as we insist, the entire title vested in the plaintiffs at her death.

But if the fee vested, at Romeo Lewis' death in his heirs, then it will be claimed by the defendants that Harry Lewis, the other brother, who died in 1860, took one-third, and at his death his son George took the same. George Lewis died in 1865, leaving his mother, Mary Lewis, who died testate in 1883, unmarried; and Jane N. Lewis was her residuary devisee of whatever interest the said Mary Lewis had in

the lands; and by virtue of the covenants of general warranty in Jane N. Lewis' deeds to the defendants, they became entitled to the said one-third interest.

Blackstone in his Commentaries, (Book II., page 107), says:

"The fee simple or inheritance of lands and tenements is generally vested and resides in some person or other; though diverse inferior estates may be carved out of it. As if one grants a lease for twenty-one years, or for one or two lives, the fee simple remains vested in him and his heirs: and after the determination of those years or lives, the lands revert to the grantor or his heirs, who shall hold it again in fee simple. *Yet sometimes the fee may be in abeyance, that is, as the word signifies, in expectation, remembrance, and contemplation in law; there being no person* in esse *in whom it can vest and abide; though the law considers it as always potentially existing, and ready to vest whenever a proper owner appears. Thus, in a grant to John for life, and afterwards to the heirs of Richard, the inherintace is plainly neither granted to John nor Richard, nor can it vest in the heirs of Richard till his death,* nam nemo est haeres viventis; *it remains, therefore, in waiting, or abeyance, during the life of Richard.* This is likewise always the case of a parson of a church, who hath only an estate therein for the term of his life; and the inheritance remains in abeyance. And not only the fee, but the freehold also, may be in abeyance; as, when a parson dies, the freehold of his glebe is in abeyance, until a successor be named, and then it vests in the successor."

This is the view taken by *Preston*, in his Treaties of Estates, Vol. 1, pp. 216–217. See also,

Illinois Centarl Railroad vs. *Bosworth*, 133 U. S., 92, 106.

BEUVIER thus defines the term ABEYANCE;

"In expectation, remembrance, and contemplation of law; the condition of a freehold when there is no person in being in whom it is vested."

"In such cases the freehold has been said to be *in nubibus* (in the clouds), and *in gremio legis* (in the bosom of the law)."

Mr. Ferne, in his Work on Remainders, (p. 513), denies that there is such a thing as an estate in abeyance. But he says:

"The law requires that a freehold should never, if possible, be in abeyance. Where there is a tenant of the freehold, the remainder or reversion in fee may exist for a time without any particular owner, in which case it is said to be in abeyance."

Blackstone says, that the famous rule in *Shelly's case* owed its origin and adoption to the aversion of the common law to the suspension of estates through the operation of abeyance; and the same spirit of the law helped to break down the limitation or creation of remote and contingent remainders.

An estate of inheritance or the fee is in abeyance where there is no one in being in whom it can vest; as in the case of a grant or devise to A for life, remainder in fee to the heirs of B, who was then living; as there can be no heir of a living man, the fee is in abeyance until B's death.

The principle of abeyance, however, has always stood fast in the law, and has carried with it very practical and beneficial results.

The plan of the feudal system, which required that there should always be some one ready to render the military and other feudal service to the lord,

fixed the ancient rule of the feudal, and later of the common law, that there should always be a tenant of the freehold, and that ought never to be in abeyance.

These principles sprang from the martial genius of the feudal system. When that system lost its vigor and in effect passed away, they were sustained and cherished by the spirit which controlled the civil policy of the Kingdom, but they never found any lodgement in the jurisprudence of the States of the American Union.

The dominant principles in the British constitution have always been monarchical and aristocratic. These canons tend to prevent the diffusion landed property, and to promote its accumulation in the hands of the few. They thus conserve the splendor of the nobility and the influence of the leading families, and rank and wealth are the bulwarks of the throne. The monarch and the aristocracy give to each other reciprocal support. Power is ever eager to enlarge and perpetuate itself, and the priviledged classes cling to those rules of descent with a tenacity characteristic of their importance, as means to the end they are intended to help to subserve.

Before the Revolution, some of the American colonies had passed laws regulating the descent of real property upon principles essentially different from those of the feudal and common law. With the close of the Revolution there came a new state of things. There was no monarch, and no privileged class. The equality of the legal rights of every citizen was a maxim universally recognized and acted upon as fundamental. The spirit from which it proceeded has

founded and shaped our institutions, state and national, and has impressed itself upon the entire jurisprudence of the country. One of its most striking manifestation is to be found in the legislation and decisions of the states upon the subject under consideration. Of the results, Chancellor Kent, in the 4th Vol. of his Commentaries, thus speaks: "In the United States the English common law of descents in its most essential features, has been universally rejected, and each state has established a law of descent for itself."

Reeve, in his Work on Descents, says:

"In the law of descents there is an almost total change of the common law. It is radically new in each state, bearing no resemblance to the common law in most of the states, and having great and essential difference in all."

The doctrine of the common law, that the freehold should never, if possible, be in abeyance, has no foothold in the jurisprudence of this country, as the main reason for its existence no longer prevails.

In *Wallace* vs. *Van Riswick*, 92 U. S., 202, it is held, that the *maxim*, that a fee cannot be in *abeyance*, is not of universal application; nor has it any weight in an inquiry as to the intent and effect of the Act of Confiscation.

In the opinion delivered by Mr. *Judge* STRONG, the Court, at page 212, say:

"It is argued, on behalf of the defendants, that because, under a confiscation sale of land, or an estate therein, the purchaser takes an interest terminable with the life of the person whose property has been confiscated, the fee must be somewhere; for it is said

that a fee can never be in abeyance; and as the fee cannot be in the United States, they having sold all that was seized, nor in the purchaser, whose interest ceased with the life, it must remain in the person whose estate has been seized. The argument is more plausible than sound. It is a *maxim* of the common law, that a fee cannot be in abeyance. *It rests upon reasons that now have no existence, and it is not now of universal application.*"

The Court further held, that though a condemnation and sale of real estate under the Confiscation Acts does not work a forfeiture beyond the natural life of the offender; that no estate in remainder, reversion or otherwise which the offender can convey is left in him after condemnation; after his death his heirs can claim it; *notwithstanding a conveyance made by him after confiscation.*

In the *Dartmouth College Case*, 4 Wheat., 691, it is held that a franchise may be in abeyance. The Court say:

"When, on the other hand, the corporation is to be brought into existence by some future acts of the corporators, the franchises remain in *abeyance* until such acts are done, and when the corporation is brought into life the franchises attach to it."

In *Terret and others* v. *Taylor and others*, 9 Cranch., 46, Judge STORY, in the opinion, says:

"By the operation of these statutes and the common law the lands thus purchased become vested, either directly or beneficially, in the Episcopal church. The minister for the time being was seized of the freehold, in law or in equity, *jure ecclesiae*, and during the vacancy *the fee remained in abeyance*, and the profits of the parish were to be taken by the parish for their own use. Co. Lit. 345, b.; 342, b. 2 Mass. R., 500."

In *Weston* v. *Hunt*, 2 Mass., 501, the Court say:

"The Minister holding parsonage lands in fee simple holds them in right of his parish or church; and, therefore, on his resignation, deprivation, or death *the fee is in abeyance until there be a successor.*"

In *Bank* v. *Sherman*, 101 U. S., 406, it was held, that the filing of a petition in bankruptcy was a *caveat* to all the world. It was in effect an attachment and injunction, and that thereafter all the property rights of the debtor were *ipso facto* in *abeyance* until the final abjudication.

Mr. Preston, in his able Treatise on Etates, insists, that an estate of freehold, depending on another estate of freehold and limited in contingency, must be in abeyance, and not in the grantor. The fee passes out of the grantor, and a vested estate of freehold necessarily precedes the remainder, and the inheritance is in contingency as well against the grantor, who has no power over it, as against the person to whom the contingent remainder is limited. Mr. Preston confidently asserts, that the argument of Mr. Ferne, however abstractly just and reasonable, is without authority, and contrary to all settled technical rules. Another able writer, (Cornish's Essay on Remainders, 175,) also contends, that the doctrine of abeyance was never shaken or attacked until Mr. Ferne brought against it the weight of his eloquence and talents.

4 Kent's Com., 260, and cases cited.

There can be no doubt that the book authorities are against Mr. Ferne. We cannot surmount the techanical rule, if technical rules are binding in questions of property. The one in this case deduces its lineage from high antiquity. It is found in the Year

Books, and is dispersed over Plowden and Coke. Though Mr. Ferne's Treatise on Remainders is distinguished for its searching analysis of cases, he has abandoned them in this instance, and followed the irresistible impulse of his judgement. Those other writers are equally masters of abstruce law; and the latter, in particular, is a shrewd and dry critic, dealing in occult points. *The fee will take an occasional flight to the clouds*, and cannot be stayed, for common sense is disabled and pierced by the *longe fallente sagitta*.

4 Kent's Com., 260, note (c.)

See Preston on Estates, Vol. I, 229, 240–255.

Greenleaf, in his Cruise on Real Property, (Vol. 1, p. 55,) says:

"We have seen that the law requires the freehold should never if possible, be in abeyance; but where there is a tenant of the freehold, the *remainder or reversion* in fee simple may exist for a time without any particular owner, in which case it is said to be in abeyance.

In *Illinois Central R. R. Co.* v. *Bosworth*, 133 U. S. 92, the Court held, that the confiscation of real estate as enemy's property by proceedings *in rem*, under the Act of Congress, puts the fee in *abeyance* merely, and upon a pardon being granted to the former owner the fee revests in him.

Prior to this decision, (say the Court), "it has been regarded as a doubtful question, what became of the fee or ultimate estate after the confiscation for life."

The Court, quote with approval, the words of Blackstone, and hold, that the fee is in *abeyance*. And suggest that, it is not necessary to be over curious

about "the intermediate estate in which the disembodied shade of naked ownership may have wandered during the period of its ambiguous existence.

"It is held in suspension."

The fact that the Legislature of Illinois has legislated on this subject, and defined the first donee in tail as having a life estate, and the issue of such life tenant as having a remainder in fee, and said nothing as to where the estate vested during the existence of the life estate, is certainly significant, and would seem to favor the idea that the fee was in abeyance.

Our claim is this, that it makes no kind of difference whether the words, *heirs of her body*, are used as words of limitation, which would make it a technical fee tail, or as *children of her body*; for, in either case, the persons who take are persons to be ascertained and determined at the death of Mrs. Lewis.

It will be seen in *Sisson* v. *Seabury*, and *Carr* v. *Estel*, *supra*, that there were no children *in esse* at the time of the devise, nor at the death of the testator, and the Court, in *Sisson* v. *Seabury*, held that:

"It necessarily results that, as the children must take under the devise, if effect is to be given to the intent, and as it is impossible for them to do so *in presenti*, they must take *in futuro*."

And it is held in *Nightengale* v. *Burrell*, 15 Pick., 104, that this is certainly true, "that the heirs of the body take after the death of the first donee, where there are no children either at the date of the will or at the death of the testator."

It is expressly provided in *Wild's Case* that the word, *children* is to be understood as a word of *limi-*

tation if there were none such at the time of the devise; but if he has children living at the time of the devise then the word children must be taken as a word of purchase, and they will take a joint estate with the first donee. (2 Williams on Ex., 937.)

Counsel for the defendants seem to disregard this important and well defined distinction between a case where there were no children living at the time of the devise and the death of the testator, and a case where there were such living at time of the devise and at the death of the testator, and the failure to make this distinction has led our learned adversaries into serious error.

WHO WERE THE HEIRS OF ROMEO LEWIS?—The defendants claim that the estate of the heirs of the body of Jane N. Lewis vested at the death of the testator; and that as there was a child born after making the will which was provided for in the will, as being heir expectant to the fee, that it became an intestate estate; and that Mrs. Lewis, at the death of the testator, became entitled to one-half, as the heir of her deceaced husband, the said child having died before the testator.

This contention is made under section 46 of the Rev. Stat. of 1845, which provides that:

"When there shall be a widow and no child or children or descendants of a child or children of the intestate, then the one-half of the real estate, and the whole of the personal estate shall go to such widow as her exclusive estate forever," etc.

And upon section 14 of the Statute of Wills of 1845, which provides, that:

"Whenever a devisee or legatee in any last will and testament, being a child or grand-child of such testator or testatrix, which shall die before such testator or testatrix, and no provision shall be made for such contingency, the issue, if any there be, of such devisee or legatee shall take the estate devised or bequeathed, as the devisee or legatee would have done had he or she survived the testator or testatrix; and if there be no such issue at the time of the death of such testator or testatrix, the estate disposed of by such devise or legacy shall be considered and treated in all respects as intestate estate."

If the position taken by counsel for defendants is correct, the defendants are entitled to the one-half interest inherited by Jane N. Lewis as heir, and one-third of the other half as devisee of Mary Lewis, and the plaintiffs would be entitled to the residue or one-third. But the fee, as we have shown, did not vest at the death of the testator. It was not possible for the fee to vest in the heirs at law, who were merely contingent reversioners in expectancy; their rights depending solely upon the uncertain contingency of Jane N. Lewis not having heirs of her body; which could not be determined until her death. The fee, therefore, remained suspended, (*in nubibus,*) or in abeyance untill her death.

If there had been a special devise to the after-born child which died prior to the death of the testator, disconnected with the class devise, of a specific property, there would be no doubt but what, under the statute, such devise would be considered intestate estate, and be so treated. In which event, one-half of the property so devised would have passed at the death of the testator to Jane N. Lewis. But in the case as it actually stands, the child could have only

taken in connection with a class as one of the heirs of the body of Mrs. Lewis. *The provision for such contingency is implied from the will and the law*, which is, that the interest of such child should go to the survivor of the class, that is, the surviving children of Jane N. Lewis, who composed the class.

It would be straining the language of the will to say, that a child born after the making of the will, which died before the testator, and also before the death of the widow, is to be understood as an heir of the body of the one to whom is devised the life estate. This child was in no sense an heir of the body of Mrs. Lewis, and, hence, not a *devisee* under Romeo Lewis' will.

All persons who are *in rerum natura*, and even embryos, may be devisees, unless excepted by some positive law. But the devisee must be in existence, except in case of devises to charitable uses. Bouv. L. D. title "Devisee;" 2 Washb. R. P., 688).

Besides it is not true that Romeo Lewis died intestate as to the whole or any part of his estate. After making special bequests, he made an unconditional devise of the entire remainder of his estate to his wife, and to the heirs of her body. The title all passed out of him, and at his death his heirs had no interest except the possibilty of a reversion. It follows as a natural sequence, that he did not die intestate.

There was no *estate disposed of by such devise*, because the said child, having died before the testator, is not regarded as ever having belonged to the class—the heirs of the body of Jane N. Lewis.

Section 14 of the Statute of Wills, above quoted, only treats of an estate as intestate where a devisee

dies; and, as in this case, there was no devisee that died, there could be no case of intestacy. And this section can bear no such construction.

The provision of section 42 is that, "All such estates not devised by will shall be distributed as intestate property." As Romeo Lewis did devise all his estate, this section of the statute is not applicable.

In *McCartney* v. *Osburn*, 118 Ill., 403, it was held, that where the devisees or legatees are specially named or designated in the will, if one of them dies before the testator, his share will lapse; but where the devise is to an indeterminate class liable to change, as where it is to the children of a person, the shares of those dying before the testator will not lapse, but will enure to the benefit of the survivors.

In the case at bar, the devisees of the remainder were not specially named or designated in the will; but such devise was to a fluctuating body of persons, which might increase or decrease until the estate vested by the birth or death of one of the class; and, therefore, the death of the child before Romeo Lewis died, did not cause whatever interest it might have had at the death of the testator to lapse, but it enured to the benefit of the survivors.

2 Jarman on Wills, *154–156, *265;

2 Redf. on Wills, 386, 170.

As said in *McCartney* v. *Osburn*, above cited, "Those that die before the gift takes effect are not regarded as ever having belonged to the class." Therefore, the child that was born after the making of the will of Romeo Lewis, but before his death, did not belong to the class that were to take the remainder,

and, for that reason, cannot be regarded as a devisee under the will.

The stipulation shows, that after the date of the will a child was born to Romeo and Jane N. Lewis; that it lived but five days, and died before the testator. It is contended by defendants that this child was a *devisee* in said will; that, as it did not live to take the property as such *devisee*, Mrs. Lewis thereby took one-half of the estate, which, by her deed passed to the defendants; and that one-third of the other half went to Harry Lewis; then to his son, George Lewis; then to Harry's widow; then by her will to Jane N. Lewis, and from her to the defendants; by which process of reasoning, defendants claim, that they, *in any event*, will take one-half, and one-third of the other half, making two-thirds of the entire estate.

The fallacy of this reasoning lies in erroneously assuming that this child of Romeo Lewis, that died before he did, was a *devisee* in said will; and that Romeo Lewis, by its death, became *intestate* as to the estate in remainder after Mrs. Lewis' death.

Our claim is, that this child, that died before the testator, was not a *devisee*; and that Romeo Lewis did not die *intestate*; and this is manifest by an examination of the various provisions of the statute.

Section 13 of the Revised Statute of 1845, page 539, provides that:

"If a child of a testator is born after making of his will, and no provision is made for it, the will shall not be revoked; but, unless it appear that he intended to disinherit the child, the other devisees shall raise a a portion equal to what it would have received, had herebeen no will."

Of course no claim can be made by the defendants under this section.

We contend that this child was not a *devisee* or *legatee*. It is not named in Romeo Lewis' will, and no *devise* or *bequest* is made to it. The devise is to the heirs of her body. These persons would be only those who were heirs of Mrs. Lewis' body at her death. Whoever at that period were the heirs of her body, would take the remainder. If there were no heirs of her body at her death, *then*, and *not till then*, the estate in remainder reverted to those who were *then* the heirs of Romeo Lewis; and until that period, as we have seen, the fee rested in abeyance. It had a *potential* existence and was ready to vest in the heirs of her body if there were such *at that period*; but if there were no such issue, then it reverted to the plaintiffs in error, as heirs of Romeo Lewis.

The words "heirs of her body," by all the authorities we have cited, mean parties that take *after* the death of the tenant for life, according to the maxim *nemo est haeres vivintus*. There could be no heirs of her body during her life. There could be none until her death.

Upon this point, Judge BLODGETT, in his opinion filed in the case of *Romeo Lewis et al.* vs. *Mohr*, says:

"I am also of opinion that whoever were the heirs at law of Mr. Lewis at the time Mrs. Lewis' life estate ended, took the estate in reversion, and that, hence, the devise to Mrs. Lewis by the widow of Harry Lewis, who was one of the brothers of Romeo Lewis, which was made many years before the death of Mrs. Jane N. Lewis, did not operate to clothe Mrs. Jane N. Lewis with any part of the fee of the estate."

See Judge Blodgett's Opinion in Appendix hereto.

EFFECT OF THE WIDOW'S ELECTION.—Jane N. Lewis elected to take the provisions made for her in the will, and thereby waived any right she might otherwise have acquired under the statute. This waiver embraced all her rights as heir, if she was an heir, to all intestate property; and she enjoyed during her life what she elected to take.

Redfield, in his work on Wills, (Vol. 2. p. 747) says:

"Where the testator gives the widow an equivalent in lieu of dower, he is regarded as having *purchased* that right for the benefit of the estate, and her right will not revive upon any failure of the testator to make an effective disposition of it."

The same author, on page 737 of same volume, thus defines an election:

"That every person, whom the instrument proposes in any particular to benefit, must elect whether he will claim under the will or against its provisions. This implies, of course, that the person thus put to an election has some rights in regard to the same subject which he could maintain independent of the will."

In Bispham's Equity it is said:

"The doctrine of election is applicable to remote and contingent interests, as well to those which are immediate and certain."

This is broad enough to embrace any portion of the estate that may be claimed as intestate or contingent or reversionary. When Mrs. Lewis elected to take under the will she thereby renounced all other interest in the estate; and was estopped from claiming any other interest.

Judge BLODGETT, in his opinion, in *Lewis* v. *Mohr*,

(See Appendix,) in speaking of Mrs. Lewis' election to take under the will, says:

"She had elected to take under the will, thereby waiving all rights as heir at law under the laws of Illinois of her husband, putting an end to all discussion in the case as to whether Mrs. Lewis' deed to John G. Mohr, by enurement or otherwise operates to convey any part of the estate which she would have taken as heir at law of her husband."

The estate in fee all passed out of Romeo Lewis by the will, hence there was nothing for an heir to inherit while Mrs. Lewis lived. Romeo Lewis was not intestate as to any of his estate; and, therefore, his widow was not his heir as to any of it. The title in reversion did not, and could not revert until after her death. There was, therefore, no possibility of her inheriting it.

II.

THE TAX TITLE.

The defendants in error having acquired the life estate of Jane N. Lewis, and holding by virtue of such life estate, were bound to pay the taxes; and could acquire no limitation by such payment that would commence to run as a bar to the interest of the remainder-men or reversioners until after the death of the owner of the life estate.

Prettyman v. *Walston*, 34 Ill., 192;

Busch v. *Huston*, 75 Ill., 343;

Waldo v. *Cummings*, 45 Ill., 421.

It may be laid down as a duty uniformly incum-

bent upon a tenant for life to pay all taxes assessed upon the land during life.

1 Washb. on Real Property, 126;

Varney v. *Stevens*, 22 Maine, 331, 334.

In *Oswald* v. *Wolf*, 129 Ill., 200, the Court at page 215, say:

"The rule is well settled that persons who, by reason of their ownership of lands or otherwise, are under a legal or perhaps a moral obligation to pay taxes and assessments thereon, are precluded by the policy of the law from becoming purchasers of such lands at a tax sale. In case of a purchase, such party obtains no independent title, the purchase being deemed in law only a mode of paying taxes." See also,

Lewis v. *Ward*, 99 Ill., 525;

McAlpine v. *Zitzer*, 119 Ill., 273;

Moss v. *Shear*, 25 Cal., 38;

Lybrand v. *Haney*, 31 Wis., 230;

Le Moyne v. *Harding*, 132 Ill., 24.

In *Prettyman* v. *Walston*, cited, it was held, that the assignee of a lease for the life of another, at a stipulated annual rent is bound to pay the taxes annually assessed on the leased premises. In the opinion, by BREESE, J. the Court say:

"Mrs. Waltson was tenant for her life of the premises, and the appellant her lessee by assignment; and the doctrine is that it is the duty of such tenant to pay all the taxes assessed during his tenancy; and if he neglects it, and suffers the land to be sold for the taxes, and purchases it himself, or suffers a stranger to purchase, and then procures a release to himself, he can acquire no right to the estate against the owner in fee. Blackwell on Tax Titles (4 ed.) 472; *Varney* v. *Stevens*, *supra*; *Young* v. *Hughes*, 5 Gil. and Johns. (Md.) 67; *McWilliams* v. *Robbins*, 5 Ohio, 25; *Carns*

v. *Chabert*; 3 Edw. Ch. 312; *Trustees etc.* v. *Dunn*, 22 Barb., 402."

The purchaser at a tax sale of land in which he has an interest as heir acquires no additional title. *Piatt* v. *St. Clair's heirs*, 6 Ohio, 93; *Choteau* v. *Jones*, 11 Ill., 322; *Dubois* v. *Campau*, 24 Mich., 368. So a purchaser of the property at a tax sale by an agent of the administrator of the deceased, late owner of the land, while he or his tenants are in possession, passes no title. *Bernal* v. *Lynch*, 36 Cal., 146; Blackwell on Tax Titles, (4 ed.) 399, 405; and cases there cited.

In the cases at bar, the lands were assessed in the name of Romeo Lewis, three years after his death, as his property, for taxes that accumulated after his death, which should have been paid by Jane N. Lewis, as the owner of the life estate; and when she purchased the tax title, she simple paid the taxes, which she was bound to pay, in that way; and she acquired no title as against the plaintiffs by the mode she saw fit to adopt in paying the taxes.

It would seem, from the course taken by Jane N. Lewis, that she had been advised that her interest in the lands was only a life estate; and having no heirs of her body, and being unmarried, and not likely to have issue, in order to divert the estate in reversion from the heirs at law of her husband, and to carry the descent of the property or the proceeds thereof to her own collateral heirs, she fraudulently adopted the scheme to permit the lands to be sold for taxes, and to have them bid in by her brother-in-law, and to procure the certificate of purchase at the tax sale to be assigned to herself, and then obtain a tax title on the lands, and thus acquire a fee, and by these fraudulent

means defeat the possibility of a reversionary interest of the heirs at law of her husband.

The case of *Olleman* v. *Kelgore*, 52 Iowa, 38, (2 N. W. Rep., 612), is on all fours like the one at bar in two essential particulars. There a life tenant, through one Rider, procured a tax title for the lands which her heirs attempted to set up as a bar to a recovery by the reversioners after the termination of the life estate. The Court *held*, that a devisee of a life estate by virtue of a will, duly probated and recorded in Indiana, where the testator died, but which had not been probated in Iowa where the lands were situated, who allowed the lands to be sold for taxes, and thereby acquired a tax title, that such title was not valid, and would not defeat the estate of the reversioners.

In that case the plaintiffs were the heirs at law of one James S. Kelly, deceased, who devised the land to one Adaline B. Worth for life, and in case she died without issue, the same was to revert to her heirs. She died without issue; and the defendants, as her heirs, set up a tax title acquired by her by a deed from H. G. Riley, who held a title under a tax sale and deed. The plaintiffs claimed, that said Adaline B. Worth acquired said tax title for the purpose of defrauding them; and that she could acquire no title under the tax deed, which would defeat them, as reversioners, for the reason, that she being the owner of the life estate, was under obligations to pay the taxes, and thus prevent the sale of the property.

The Court, in the opinion, say:

It is not denied by counsel for defendants that if

Worth had an interest in the land which imposed upon her the duty of paying the taxes, she could not acquire a tax title, in the manner shown in the record, so as to defeat the reversion in plaintiffs. This undoubtedly is the law. Nor can it be denied that a person holding a life estate in lands is bound to pay the taxes. If, therefore, Worth held a life estate in the lands, she could not acquire a tax title so as to defeat the plaintiffs, who were the reversioners. * * * But it is urged by defendant's counsel that Worth did not take an interest in the land, for the reason that the will was not admitted to probate until she acquired the tax title, and indeed until after her death. It had been admitted to probate in the State of Indian, *where the devisor died.* While it is true that probate of a will is necessary to perfect it as an instrument of title, yet without probate it would be capable of conveying an interest in the land. Certainly it was in that condition the foundation of an equity and claim in and to the land. It appears, indeed, that Worth did claim an interest in the property under the will. *Surely, while claiming such an interest she could not acquire a tax title which would defeat the reversioners,* the plaintiffs in this action."

If Jane N. Lewis could, by permitting the lands in question to be sold for taxes, having them bid in by her brother-in-law, and procuring an assignment of the certificate of purchase to herself, and obtaining a tax deed thereon, defeat the reversionary interests of the heirs of Romeo Lewis, she, in the same manner, could have defeated the interest in remainder of the heirs of her body, if she had, or should thereafter have any such heirs.

III.

STATUTE OF LIMITATIONS.

The defendants in error claim under the Statute

of Limitations: *First*,—Under section 1, adverse title and possession, without notice, for over twenty years; *Second*,—Under section 6, *claim and color of title*, made in good faith, actual possession and payment of taxes for the period of seven years.

The plaintiffs in error claim that the Statute of Limitations cannot run as against them, they being reversioners, during the life time of Mrs. Lewis, the owner of the life estate; because during that period they had no right of entry or action.

No disseizen of the tenant of a particular estate and occupation under it however long continued will affect the right of the reversioner. And the doctrine may be laid down as universal, that no possession can be held to be adverse as to one who has no right of entry and possession during its continuance. *Dwyer* v. *Schaffer*, 55 N.Y., 451. The latter may enter whenever the particular estate shall determine by its limitation. *Miller* v. *Ewing*, 6 Cush., 34; *Jackson* v. *Shoonmaker*, 4 Johns., 390; *Salmons* v. *Davis*, 29 Mo., 176. *Doe* v. *White*, 1 Kerr, N. B. 627. The statute does not run against a reversioner till the death of the tenant for life, when the latter has conveyed the estate in fee. *Gernett* v. *Lynn*, 31 Penn. St., 94; *Melvin* v. *Lock and Canal*, 16 Pick., 137; S. C. 17 Pick., 255; *Raymond* v. *Holden*, 2 Cush., 269; *Pickney* v. *Bunage*, 30 N. J. Law, 21. And where a husband and wife were disseized, and the disseizor held adverse possession for the period of limitation, which possession would bar the right of the husband, if living, at his death, she, or her representatives might claim the land. *Gregg* v. *Tesson*, 66 U. S., 154.

3 Washb. Real Rrop., 147; 1 ib. 142, 143.

If the possession was taken under a title not originally hostile to the true owner it will be intended that his possession was not adverse. Tyler on Ejectment, 878; *Jackson* v. *Thomas*, 16 Johns., 292; *Smith* v. *Burtis*, 9 Johns., 180; *Jackson* v. *Johnson*, 5 Cow., 74. And the purchaser of an estate for life holds in subordination to the reversioner; and an adverse possession againt the reversioner cannot be predicated on it. Tyler on Ejectment, 919, 920; *Jackson* v. *Graham*, 3 Cains, 188; *Jackson* v. *Town*, 4 Cow., 599; *Jackson* v. *Parker*, 9 Cow., 73. And this is the law although he supposed his deed gave him the fee. *Learned* v. *Tallmadge*, 26 Barb., 443; *Barrett* v. *Stradl*, 73 Wis., 394. The Statute of Limitations does not run against reversioners. Hilliard on Real Estate, 568; 2 ib., 170; Angel on Limitations, Sec. 370.

The possession of a tenant for life is never deemed to be adverse to his reversioner.—1 Washb. on Real Prop., 126; *Grout* v. *Townshend*, 2 Hill, 554; *Austin* v. *Stevens*, 24 Maine, 526; *Varney* v. *Stevens*, 22 Maine, 334. Nor if he be disseized are the rights of the reversioner thereby affected; and he may enter or sue in an action to recover possession within twenty years after the death of the tenant for life, without regard to the lapse of time during which the disseizor may have held the premises. *Jackson* v. *Mallin*, 2 Wend., 357; *McCorry* v. *King's heirs*, 22 Tenn.; (3 Humph.,) 367–375; *Jackson* v. *Schoonmaker*, 4 Johns., 390; *Foster* v. *Marshall*, 2 Foster, 491; *Guion* v. *Anderson*, 8 Humph., (Tenn.) 325. And if one who enters upon land under an agreement with a tenant for life, continues to hold possession after her death he be-

comes as to the reversioner a mere trespasser. *Williams* v. *Caston*, 1 Strobh., (S. C.) 130.

It has been further held, that if the tenant for life do any act with the property which works a forfeiture of the same it only effects his interest, but not that of the reversioner. *Archer* v. *Jones*, 26 Miss., 583, 589. So if the tenant does an act by which he incurs a forfeiture of the estate the reversioner is not bound to treat the estate as merged in his own and enter immediately; he may have his action after the death of the tenant for life without being affected by the previous possession. Nor can a tenant for life who creates an estate by grant or otherwise defeat his grant by surrender to his landlord or reversioner.

1 Washb. on Real Prop., 126; 2 Ib. 329;

Moore v. *Luce*, 29 Penn. St., 263.

It is no matter how many estates are carved out of the owner's entire estate, a reversion will be left, provided, these do not amount in quantity to his original estate. Thus the owner of a fee may grant twenty or more successive life estates and still retain his fee simple of the land, though his right of possession will be suspended till these life estates shall have been exhausted.

It was upon this principle, that after the statute *de donis*, there was always held to be a reversion in the grantor of an estate tail, upon the idea that the succession of life estate, which the successive tenants in tail were to enjoy, might at some time cease, and no one have a right to claim the estate under the original limitation.

2 Washb. on Real Prop., 738–739.

In *Higgins* v. *Crosby*, 40 Ill., at page 262, the Court say:

"There is no dispute that possession and payment of taxes, under claim and color of title for seven successive years, will bar a recovery in all cases where there is a present right of possession during the period for which the statute is required to run and its requirements are performed. The act of 1839 has been repeatedly held by this Court to be a limitation law, and it can only be sustained upon that ground.

"And it is believed to be universally true that the bar of the statute can never be invoked, unless the party against whom it is sought to be used has had the opportunity of asserting his right during the statuary period. If the right is of such a character that a party is not entitled to make an entry, the statute can never run. It can only begin after the right of entry has accrued. Where the title sought to be defeated by the bar is a reversion or a remainder, the holder of such titles have no right of entry, and, having none, they are guilty of no *laches* in failing to make an entry, or in asserting the right. Such titles are not present and existing rights of possession, but only a present interest, with a future right of possession. It would be unprecedented to hold that a right of entry was barred where such a right had never accrued. A party cannot be prejudiced by the non-assertion of a right that does not exist.

"It is certainly true, however, that the statute may run, and the bar become complete, against an estate for life or for a term of years, as in such cases the right of entry is a present existing right. But in such cases when the particular estate is spent, the bar falls with that estate, and the right of entry then accrues to the remainder-man or revisioner, and then, and not till then, the statute begins to run against him. And he must have the same period within which to assert his title, as was had by the owner of the particular estate. In this case the bar was complete against Wright in his lifetime, but until his death it did not commence to run

against his wife who held the reversion. During the life of her husband she could not have mantained, at any time after the conveyance to Mrs. Rogers, any action for the recovery of the premises, and she would have been a trespasser had she made an entry, and could have been ejected from the premises.

"It is however urged, that Mrs. Wright had the power at any time during the coverture to pay the taxes, and to thus stop the running of the statute; that, had she done so once in seven years, she could have prevented the bar of the statute. It is a sufficient answer to this position to say that it was the legal duty of the tenant for life to pay the taxes, and by discharging that duty he could acquire no rights against plaintiffs in error. Had the duty devolved on her then it would have more the appearance of plausibility. Had the owner of the life estate neglected the duty, she, being a *feme covert*, would have had the right when she became *sole* to redeem the land from any sale for taxes which might have resulted from the neglect."

See also, *Steele* v. *Gelletly*, 41 Ill., 39;

Dugan v. *Folliett*, 100 Ill., 581, 589;

Whiting v. *Nichol*, 46 Ill., 230.

In *Miller* v. *Pence*, 132 Ill., 150, it was held, that a wife holding only an inchoate right of dower in the land of her husband during his life, is not required to pay the taxes on the same, or any part thereof, to protect that right.

In *Rohn* v. *Harris*, 130 Ill., 525, the Court held, that the possession of grantees of a tenant for life is not during the life of the grantor adverse as against the reversioner within the purview of the Statute of Limitations; and the statute does not run against a reversioner during the existense of the prior estate.

The Court, in the opinion, page 531, say:

"It is also claimed that whatever rights complainants had in the property are barred by the Statute of Limitations. It may be true that defendants' grantees, Jones and Thompson, held possession of the property under color of title, and paid all taxes for more than seven years; but the bar of the Statute of Limitations cannot be invoked to defeat the title of the complainants, under the facts in the case, on the ground that the possession was not adverse. It will be remembered that Edward Tull devised his undivided half of the ferry to his wife, Mary Ann, for life, while the remainder of the fee passed to complainants. Mary Ann sold and conveyed this life estate to Beard, in 1849. Beard held under this title until his death, and Jones and Thompson, who subsequently acquired Beard's title, held under the same title, and the defendant occupies under the same title. The various deeds and wills are upon record, so that each purchaser had notice of the title under which he occupied the property. Until the termination of the life estate by the death of Mary Ann Tull, which did not occur until 1886, the complainants, as remainder-men, had no right of entry, as they had no right to the possession until the death of the life tenant, and until the death of the life-tenant the statute could not begin to run. It is a plain proposition, as held in *Higgin* v. *Crosby*, 40 Ill., 260, that the statute does not run against a reversioner or remainder-man during the existince of the prior estate, because during that time he has no right of entry."

In *Mettler* v. *Miller*, 129 Ill. 630, the Court held, that the possession of a vendee of a life-tenant is not adverse to that of the reversioner during the life of the tenant for life; and until his death such possession is not sufficent to set the Statute of Limitations in motion, though such vendee claims to own the land in fee.

The Court, after giving a history of the title, and the facts in the case, at page 641, say:

"Appellee brings himself within the letter of both sections of the limatation law of 1839, but not within their spirit. Thomas D. Robertson, from who he holds by *mesne* conveyances, had a warranty deed from Palmer, made in 1855, and paid all the taxes assessed on the premises for eight successive years, from 1856 to 1863, both inclusive, and during all that time said pemises were vacant and unoccupied; and no claim is made that such deed was not color of title made and taken in good faith. So, also, Parker, under his warranty deed from Van Nortwick, took actual possession of the lands in 1867, and conveyed to the Millers in 1869, and transferred his actual possessions to them, and they continued to occupy the promises until 1872, when James F. Miller deeded to appellee, and the latter remained in actual possession until this suit was brought, in 1885, making more than fifteen years of actual possession under color of title made and acquired in good faith. Payment of all taxes assessed during these periods of actual possession by the proper parties claiming ownership in fee, is admitted by the stipulation.

"In *Kirk* v. *Smith*, 9 Wheat., 241, Chief Justice MARSHALL said: 'One of the rules applicable to limitation laws which has been recognized in the courts of England and in all others where the rules establish in those courts have been adopted, is, that the possession, to give title, must be '*adversary*.' The word, indeed, is not to be found in the statutes, but the plainest dictates of common justice requires that it should be employed. It would shock the sense of right which must be felt equally by legislators and by judges, if a possession which was permissive and entirely consistent with the title of another, should silently bar that title. In *Turner* v. *Chamberlain*, 15 Ill., 273, this Court said: "To constitute an adverse possession it must be hostile in its inception, and acquired and retained under claim of title inconsistent with that of the true owner." In fact, as was said by BREWER, J., in *Dewey* v. *McClain*, 7 Kan., 130: "any other construction would operate to deprive the reversioner

of his estate without his day in court, and would be therefore, unconstitutional."

"That which in this case is conclusive against the right of the appellee to avail of the Statute of Limitations, is the fact that Isaac Ross, the husband of the true owner, and for whose life appellee held a life estate in the premises, did not die until March 20, 1885—only a few months prior to the commencement of this suit. The settled doctrine, both upon authority and upon principle, is, that the possession of land by a tenant for life cannot be adverse to the remainder-man or reversioner; and if he conveys to a third person, by words purporting to pass the absolute property, the possession of the purchaser is not and cannot be, during the continuance of the life estate, adverse to the remainder-man or reversioner, so as to set the Statute of Limitations running against such remainder-man or reversioner; but after a life estate falls in, the possession will be adverse as to a remainder-man or reversioner. The reason of the rule first stated is, that the possession of the tenant for life, or his vendee, during the continuance of the life-tenancy is, in contemplation of law, the possession of the remainder-man or reversioner, and the latter cannot, during the life of the person for whose life the estate is, bring an action against the person in possession under such life tenant, to recover the possession of the premises. *All Statutes of Limitation are based on the theory of laches*, and no *laches* can be imputed to one who has no remedy or right of action, and to hold the bar of the statute could run against the title of a person so circumstanced, would be subversive of justice, *and would be to deprive such person of his estate without a day in court.* See 1 Am. and Eng. Encyclopedia of Law, pp. 237–238, and authorities cited in notes; *McCorry* v. *King's heirs*, 3 Humph., 267; *Mellus* v. *Snowman*, 21 Me., 204; *Merriman's Heirs* v. *Caldwell's Heirs*, 8 B. Monr. 32; *Constantine* v. *Van Winkle*, 6 Hill, 193; *Reaume* v. *Chambers*, 22 Mo., 36; *Giddings* v. *Smith*, 15 Vt., 344; *Barrett* v. *Stradl*, 73 Wisc., 385; *Orthwein* v. *Thomas et al.*, 127 Ill., 554.

"The language of the stipulation in this case, that appellee and his immideate grantors claimed to be the owners in fee, is not conclusive of adverse holding. Nor were the title and possession under the warranty deeds purporting to convey the fee and the entire property, necessarily in adverse. Whatever appellee and his said grantors may have considered or claimed in respect to their title, both he and they must be deemed in law, during the life of Isaac Ross, to have come in under the title which has been traced to them, and under which he and they were rightfully entitled to possession, since no different source of title is shown."

See *Ziller* v. *Eckhard*, 4 How., U. S. 389.

In *McCorry* v. *King's heirs*, 22. Tenn., (3 Humph.), at page 273–274, which was an action of ejectment, the Supreme Court of Tennessee, in speaking of the Statute of Limitation as applied to remainder-man or reversioners, say:

"It is argued that the Statute of Limitations applies in this case, and bars the right of the defendants in error; that Jane King, their mother, in whose right they claim, died in 1828, and they did not within three, or within seven years, bring an action after her death, and after her title accrued; that tenancy by the courtesy or other particular estate is not an exception within the statute; and that when the statute has made no exception the court can and will make none.

"The argument in its principle would extend to and embrace all particular estates of what kind and description soever; and whether created by deed, by will or by operation of law, and bar the remainderman or reversioners if for seven years they fail to bring suit, if under none of the disabilities stated in the statute.

"It is true those particular estates are not included in any exception of the statute. It would have produced confusion and absurdity to have attempted this,

because the benefit of the exceptions contained in the statute is conferred upon those to whom a right has come to sue the tenant in possession, and who, therefore, would be barred by the general provisions of the statute, but that they are protected by some of the enumerated disabilities. But no right or title or cause of action has come, accrued or fallen to enable a reversioner or remainder-man before the termination of the particular estate to sue the tenant in possession; and, therefore, the reversioner or remainder-man under such circumstances, whether within an exception of the statute or not, is wholly unaffected by the statue. The person barred by the statute is one whose right of entry or to bring suit has come or accrued, and who, after that event, omits or neglets for the space or term of seven years to bring such suit. The person protected by the statute is one who has been in actual possession for the whole term of seven years claiming adversely against one, who has during the whole term had the right to enter or bring suit. Those claiming under the disabilities enumerated in the statute have the right and power to bring suit, but are excused therefrom on account of such disabilities. *But a remainder-man or reversioner has no right or power to bring an action; he is not excused therefrom, for he cannot do it at all. His omission of it is no neglect; his postponement of it is no laches. His right to an action has not yet accr'ed. He cannot during the time of the tenant for life lose his estate or be barred of his right by the fault or wrong, neglect or laches of the owner of the particular estate.* There is nothing in the statute which implies this, but much which implies the contrary. The persons barred by the first setion of the statute of 1819 are those who shall neglect for the term of seven years to avail themselves of their title by suit in law or equity, and the same principle of laches and neglect to sue within seven years after the accrual of a title or right of action as operating a bar is found in the second section."

In *Jackson* v. *Schoonmaker*, 4 Johns., 390, it is said, that neither a descent, cast nor the Statute of

Limitations will effect a right if a particular estate existed at the time of the disseizin when the adverse possession began. The same point is held in the case of *Jackson* v. *Sellick*, 8 Johns., 262; and in the case of *Jackson* v. *Johnson*; 5 Cow., 96; *Sutherland*, J., says, the *proviso* was intended to save those who in judgment of law had a reasonable excuse for their delay, and to give to them and their heirs ten years after the disability should be removed, to bring such action or make such entries as they might have brought within the twenty years.

In this case, Chief Justice SAVAGE, in delivering the opinion of the Court, said:

"Before the statute can by any reasonable construction be made to operate *there must be some laches on the part of those ascerting a right of entry*, and the policy of the statute gives to every claimant at least ten years within which *laches* shall not be imputed."

The statute would work great injustice if it were held to effect the rights of reversioners or remaindermen during the continuance of the particular estate or the estate for life. To so hold would in effect deprive the reversioner or remainder-man of his rights without ever having a day in court. And if the Statute of Illinois relating to limitations should bear this construction it would be transcending the power of the Legislature, and as to such revisioner or remainder-man would be unconstitutional and void.

The plaintiffs in error are guilty of no laches.— They do not claim under the will of Romeo Lewis, but by descent as his heirs at law. Until Mrs. Lewis' death in 1888, without heirs of her body, it was not known and could not be known that the plaintiffs

would have an interest in the property. As they do not claim under the will and had no vested interest until the death of Mrs. Lewis without issue, no duty devolved upon them to record the will in Woodford County or elsewhere, or to give notice to the defendants of their contingent expectations or to do any act to protect the land.

Until the rights of the plaintiffs vested, they had no power to appear in court to defend or protect the title, to make an entry or assert any rights with respect to the property, or to in any way stop the running of the Statute of Limitations.

In *Mettler* v. *Miller*, 129 Ill., 642, it is said, that:

"All Statutes of Limitations are based on the theory of *laches, and no laches can be imputed to one who has no remedy or right of action*, and to hold the bar of the statute could run against the title of a person so circumstanced, would be subversive of justice, and would be to deprive such person of his estate without his day in court."

In the Court below, Judge BLODGETT held, that the defense under the Statute of Limitations was complete, which we insist was error. The learned Judge, in his written opinion, says:

"It is true, that these plaintiffs or their ancestors had, as insisted in their behalf, no right of entry upon these lands until the termination of Mrs. Lewis' life estate; but it does not follow that because they had no right of entry, they, or those under whom the present plaintiffs claim, had no right to protect their possible estate in reversion. *They could have enjoined Mrs. Lewis, or any one claiming under her, from committing waste;* and if Mrs Lewis neglected or refused to pay the taxes, and suffered the property to be sold for taxes, thereby endangering the title in fee, they

might have filed a bill in equity and had the property placed in the hands of a receiver with power to redeem from such sale. Story's Eq. Juris. sec. 913, *et seq.*; High on Receivers, Secs. 11 and 672.

"With these rights to interfere for the protection of the property from the consequences of neglect of the life tenant, it seems self evident to me, that when Mrs. Lewis, having become clothed with color of title in fee by this tax deed of 1849, assumed to make a conveyanc in fee to a person who had no notice that her real interest as against the heirs of her husband was only a life estate, these heirs were bound to assert their possible interests in apt time; that whoever were the heirs at law in 1856 of Romeo Lewis, when Mrs. Lewis, by her agent, sold the lands in question in this suit in fee to Dehority and put him in possession, thereby dealing with the property as if she were the owner in fee, it was the duty of these heirs to have interfered, and appealed to the proper courts for redress. At the time of Mr. Lewis' death, when his will took effect, Mrs. Lewis had no heirs of her body, and his reversioners of the fee in expectancy, and in fact ever since the death of Mrs. Lewis, his heirs at law, have at all times been the reversioners in expectancy; and I think it needs no argument to show that the neglect of these heirs to assert their possible interest in the land in time to rescue it from the operation of the limitation laws of Illinois, is binding and effective upon the present plaintiffs."

We have examined the authorities cited by the distinguished jurist, and find they do not support the position taken. The error the learned judge makes, we respectfully suggest, is in failing to make a distinction between an estate in reversion and a possibility of reversion, not coupled with an existing interest. In the former there may be a right of action in a proper case as stated, but in the latter there cannot be.

Washburn on Real Prop. (Vol. 1. Page 152, Sec. 41), says:

"No one could maintain it (an action for waste.) but he who had *an immidiate estate of inheritance*, upon the determination of the estate in dower or courtecy without any interposing vested freehold."

And at page 155, sec. 50, he further says:

" No one, however, whose interest is that of a contingent remainder or executory devise can maintain an action at law against a tenant for life for committing waste upon the premises."

In *Hunt* v. *Hall*, 37 Maine, 365, which was an action on the case in the nature of waste, the, Court by APPLETON, J., say:

"Ephraim Hunt, under whom the plaintiffs derive title, by his last will gave a life estate in the premises in which waste is alleged to have been committed, to his wife, and after her decease, directed that equal division should be made among all his children, and the heirs of such as might then be deceased, of all his property, both real and personal. The tenant for life is still living, and the defendant represents her estate.

"The rights of the parties depend upon the nature of the estate, which was devised by the will of Ephraim Hunt, which was in the words following: "*After* the decease of my dear wife, my will is that my executor, hereafter named, cause an equal division to be made among *all my children* and the heits of such as may be then deceased." The persons who are to take are not those who are living at the death of the testator. The division is not then to take place. This is to be done at a subsequent and uncertain period. If the estate were to be construed as vesting at the death of the testator, an heir might convey by deed his share of the estate, and if he should decease before the termination of the life estate, leaving heirs, his conveyance would defeat the estate of such heirs. This would be against the express provision of the will,

which provide that the estate should be divided "among his children and the heirs of such as may then be deceased." By the terms of the will, the estate is not to vest till after the death of the widow, and then the division is to ensue. Till then there is a contingency as to the persons who may take the estate.

"Contingent or executory remainders, whereby no present interest passes, are when the estate in remainder is limited to take effect, either to dubious and uncertain *persons*, or upon a dubious or uncertain *event*; so that the particular estate may chance to be determined and the remainder never take effect. 2 Bl. Com., 169. In *Olney* v. *Hull*, 21 Pick., 311, the words of the devise were almost identical with those in the case now under consideration, and the Court held that until the death of the widow it was uncertain who would then be alive to take, and that therefore no estate vested in any one before that event happened. Where an estate is limited to two persons during their joint lives, remainder to the survivor of them in fee, such remainder is contingent, because it is uncertain which of them will survive. 2 Cruise's Dig. Title 16, Remainder, c. 1, sec. 21. So where one devised lands to his daughter H. and her husband, for their respective lives, and after their death to the heirs of H. it was held, that the remainder was contingent until the death of H., and then vested in the persons who were then heirs. *Richardson* v. *Wheatland*, 7 Met., 169; *Sisson* v. *Seabury*, 1 Sum., 235.

"It is obvious that by the terms of the will, the plaintiffs took a contingent and not a vested remainder. They are not within the provisions of R. S. c. 129, and consequently are not entitled to maintain this action."

In *Peterson* v. *Clark*, 15 Johns., 205, it was held, that an action for waste could only be maintained by the person who has the *next immidiate estate of inheritance* in reversion or remainder, and a person having an ex-

pectant interest in lands less than the inheritance cannot maintain it.

We submit that up to the time of Mrs. Lewis' death, in 1888, the estate of the heirs at law of Romeo Lewis, deceased, was simply a *possibility of reversion.* (See the distinction drawn in *Heath* v. *Barmore*, 50 N.Y., 302; *Nichol* v. *Railroad*, 2 Kernan, N.Y., 130–134). In 4th Kent, 370, it is said that the grantor of an estate upon condition has only a possibility of reverter, and no reversion; and in the note to page 11, he says: *There is only the possibility of a reverter left in the grantor, and not an actual estate.* See *Martin* v. *Strechen*, 5 Term R. 107, note. For examples illustrating the distinctions between a naked possibility and a possibility coupled with interest, see 2 Kernan, 134; 4 Kent, 362, b.; *Jackson* v. *Waldron*, 13 Wend., 178; Iredel, N. C., 570.

Romeo Lewis devised his entire estate in fee tail to his wife, and until her death the heirs of the testator had simply *a possibility of reverter* but no vested estate. This being conceded, they had no more right to interpose by injunction or the appointment of a receiver than a son has with reference to his father's estate during the life of the father.

In case of a wife having an inchoate right of dower, which is a mere intangible contingent expectancy, it is held, that she has no power whatever of asserting any right against her husband or any one acquiring his title from or under him. "She can bring no action to arrest the running of the statute."

Miller v. *Pence*, 132 Ill. 151, 161.

His Honor, Judge BLODGETT, in his opinion in the cases at bar, says, that the heirs of Romeo Lewis, *could have enjoined Mrs. Lewis or any one claiming under her, from committing waste.* If the learned Judge's position that the plaintiffs, as heirs, during the life of Mrs. Lewis were vested with sufficient title to enable them to maintain an injunction, is correct, then the inquiry would naturally arrise, what threatened waste could they have enjoined? It cannot be claimed that they could have enjoined her or any one claiming under her from past premissive waste, or from doing that which had been already done; they could only restrain her or them from committing future voluntary waste, such as threated cutting of timber, removing permanent buildings, and the like, such as would be destructive to the estate of inheritance or productive of irreparabe mischief.

In view of the fact, that the lands in controversy were wild and uncultivated up to the time Mrs. Lewis conveyed the same to the defendants in error; and that nothing is claimed or alleged to have been done by the grantees of Mrs. Lewis to the injury of the inheritance, it is difficult to understand on what grounds an injunction could be asked or maintained against them. The only complaint that could have been made as against Mrs. Lewis was her failure to pay the taxes in the proper and usual way, and permitting the lands to be sold for taxes, and, through her brother-in-law, bidding them in, receiving a certificate of purchase and obtaining a tax deed, which was the mode adopted by her for paying the taxes which it was her duty to pay, and which amounted in law to the payment of taxes by her.

The tax title attempted to be acquired, being irregular and void for want of a judgment for taxes to support it, worked no injury as against the contingent

reversioners in expectancy of the estate; against whom the Statute of Limitations could not run during the life of Mrs. Lewis.

If it had been a valid tax title, a different question might arise. Judge BLODGETT, in his opinion, makes this inquiry.

"Suppose Mrs. Lewis, after the death of her husband, in view of the fact that these lands were wholly unproductive, and so being only a burden upon her, by reason of the annual accruing taxes, had abandoned them, and paid no taxes, and this defendant had bought them in at a tax sale in 1846, and after obtaining a tax deed had entered upon the actual possession, and remained since that time in full possession up to the time of this suit, and had regularly paid all taxes,—can there be any doubt that, under the Statute of Illinois, he would have obtained a valid title as against these plaintiffs?"

This may be correct, provided the taxes were legally assessed, and judgment obtained regularly against the lands for taxes and a sale made and all of the requirements of the State conformed to. This might, as the learned Judge says, have given the defendants an absolute title in fee. But in this case the defendants are not claiming that there was a valid tax sale, or that Jane N. Lewis, or the defendants acquired a valid and legal title through the tax deed; because, if they made any such claim, they would be compelled to show a valid judgment of a court of competent jurisdiction authorizing the sale; and they would also be obliged to prove that all the proceedings incident to the sale were complied with. The tax deed was simply offered by the defendants as *claim and color of title* under section 6 of the Statute of Limitations. And, as the Statute of Limitations

cannot be invoked to defeat the rights of reversioners, the fact that a tax deed may be the foundation for a claim and color of title is of no avail to the defendants.

We respectfully submit that the Court below is also in error in assuming that Mrs. Lewis, at the dates of the bonds for deeds and conveyances from her under which the defendants respectively claim title, was clothed with color of title in fee by her tax deed of 1849.

Before she could be held and adjudged to be the legal owner of the lands under seetion 6 of the limitation laws it must appear that she was in the *actual possession* under claim and color of title, *made in good faith*; that she continued in such possession for the period of seven years, and during said time paid all taxes on such lands.

She had a bare tax deed, without any judgment to support it. Her pretended color of title was *not made in good faith*, but was fraudulently procured to defeat the heirs of her deceased husband, who in the future might possible become reversioners. It is not shown or admitted that she ever paid any taxes except in 1846, and then only by purchasing at the tax sale. The lands being wild and uncultivated, she was never in the *actual possession*. Every element required to entitle her *to be held and adjudged* to be the legal owner of the lands is wanting in order to clothe her with color of title *made in good faith*.

The records of Woodfort County were notice to the defendants that there was no judgment against the lands for taxes; and they were bound to know that

the tax deed was void for want of a judgment to support it. The lands being vacant, wild and uncultivated, with no person in the actual possession, the Statute of Limitations could not have run during the period of seven years prior to the purchases from Mrs. Lewis, and she was not "clothed with color of title in fee by the tax deed of 1849."

The color of title under which the defendants claim is the conveyances from Mrs Lewis, and these would be sufficient if the plaintiffs had been in a position where they could have asserted title; but the defendants could acquire no color of title or other rights during Mrs. Lewis' lifetime to the prejudice of the plaintiffs as reversioners in expectancy.

The plaintiffs offered the will in evidenc for the sole and limited purpose of showing that Mrs. Lewis had a life estate, and, therefore, could take nothing by her tax deed; and that limitation did not run against them. They also showed that the persons who under the will were to take the remainder, were not in existence; and, that, therefore, for want of such persons the estate at the death of Mrs. Lewis, in 1888, went to the plaintiffs, by way of reversion.

NOTICE.—*Recording of Will.*—The defendants claim that by the statute, "if the party in possession, having purchased of the tenant for life in good faith, believing he had purchased the fee, has no notice, either actual or constructive, of the existance of an unrecorded deed or will by which the grantors title would be shown to be an estate for life he is not to be prejudiced by the production of such an instrument, and

it does not prevent the running of the statute in his favor."

This, the defendants claim is decided in *Dugan* v. *Folliett*, 100 Ill., 581. The Court in that case, after holding that the Statute of Limitations did not run against remainder-men, refers to section 30, Chapter 30 of the Rev. Stat. entitled "Conveyances," which provides, that:

"All deeds, mortgages, and other instruments of writing which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers, without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers, without notice, until the same shall be filed for record." And the Court say:

"To hold that the appellants, under the facts in this case, are to be affected in any manner by the Jennings deed would be to simply disregard this plain provision of the statute, which we are not permitted or inclined to do."

In the case cited, one Hugh Rhodes, on November 20, 1850, conveyed the lands in controversy to Eunice Jennings for life, and the remainder in fee to her six children, viz: Orrin, Alonzo, Alvin, William, Robert and Hellen. This deed, from some cause or other, *was never put on record*; but Mrs. Jennings, at the date of the deed, was in possession, and continued so until in March, 1852, when she transferred it to Peter Nelson. Previous to delivering possession to Nelson she and her sons, William and Alvin, conveyed all their interest to one Franklin Rhodes, who, on March 6, 1852, conveyed to the said Nelson by warranty deed. By mesne conveyances, George Dugan obtained

title. Mrs. Jennings died, Nov. 18, 1875. The heirs, Orrin, Hellen, Alonzo and Robert, still owned their interests in the lands, but were not in possession. The suit was to recover their interest under the unrecorded deed, which the Court held to have been their duty to have recorded, in order to be effective against subsequent purchasers etc.

The defendants in the Court below, also cited *Safford* v. *Stubbs*, 117 Ill. 389, cited in *Dugan* v. *Folliett*, in support of their contention relative to the effect of the non-recording of the will of Romeo Lewis, deceased.

In that case, one Darrah, the owner in fee of the land in controversy, died in Berks Co., Penn., in 1850, testate; and by his will devised the land to one Josiah Weiser, for life, and the remainder to his lawful heirs. In January, 1856, Weiser executed a quit-claim deed of all his interest in the land to one Reiner; who, in October, 1856, conveyed by a like deed to one Berkey, who went into possession, paid all taxes assessed, and continued in possession for a period of over twenty years before July 14, 1883, the date of the commencement of these suits. Darrah's will was probated in Berks Co., Penn., where he died; but was never admitted to probate, or recorded in Illinois, in the County where the land is situated. Neither Reiner nor Berkey ever had any notice of the contents of the will; nor that the interest of Weiser was merely that of a life tenant. Weiser died, July 24, 1863, leaving Eliza V. Weiser, (one of the appellants,) his widow, and two daughters, Florence, (who died, Aug. 26, 1863,) and Ada A., now Ada A. Safford, (one of the appellants). After the death of Josiah Weiser, Eliza V. and Ada

A. became, by the terms of Darrah's will, and by inheritance from Florence, the owners of the reversionary estate.

It was claimed that Berkey entered under a conveyance of an estate for the life of Weiser; that his estate ceased with that life; that he then, being lawfully in possession, became the *tenant at sufferance* of Mrs. Weiser and Mrs. Safford, the persons entitled to the reversion, and so could not hold advesrely to them. Upon this contention. the Court, in its opininn say:

"We do not think, that this position is well taken under the facts of the case, Berkey having been in possession, and paid taxes for more than seven years *after the life estate terminated*, and the reversionary estate had attached."

The Court, in the opinion, page 394, further say:

"It may be, that Berkey, though he had been in possession and paid taxes for seven years after the tenant for life died, would be debarred from setting up the statute against the owner of the remainder, if he had had notice that his grantors's interest was only a tenancy *pur autre vie*. (*Dugan et al.* v. *Follett et al.* 100 Ill.) But having had no notice, he did not enter upon the land knowing or believing himself to be the owner of an estate for the life of another, and could not be considered a tenant at sufferance of the reversioners after the estate for life ended. His claim was, thererfore, adverse to the reversioners, and not in subordination to their title."

The case of *Safford* v. *Stubbs* is in some respects analogous to the cases at bar. In that case Darrah's will was admitted to probate in Pennsylvania, but was never admitted to probate or recorded in Illinois. In these cases, the will was admitted to probate and recorded in Ohio, and a copy thereof was recorded in Wood-

ford County, August 15, 1866. In *Safford* v. *Stubbs* the reversioners were barred because seven years had expired after the tenancy for life had terminated before the bringing of the suit. In these cases, the suits were instituted one year after the death of Mrs. Lewis, the life tenant, and the plaintiffs are not barred.

The law of Illinois requiring deeds to be recorded was enacted in 1833, and subsequently incorporated in the revision of 1845. It relates solely to the recording of original instruments. The recording of original wills was not included in, or contemplated by such statute. All wills were required to be proven and recorded in the County where the tastator resided at the time of his death; and could not be removed from the place of probate, and carried from County to County or from one State to another to be recorded.

By the laws of Ohio and Illinois, all original wills are required to be kept and remain in the office of the clerks of the Probate Court of the proper County. Rev. Stat. Ill. 1845, page 1474. Geaque's, Rev. Stat. of Ohio, section 5930, p. 1074.

There was no statute in Illinois authorizing the recording of original wills duly proved, or copies thereof duly certified according to law and exemplification of the records of foreign wills untill the act of Feb. 14, 1857; which authorized them "to be recorded in the same office where deeds and other instruments concerning real estate may be required to be recorded." And the same were made notice from the date of filing for record, as in other cases.

The defendants in error, in their argument in the Court below, claimed that section 22 of the Illinois

Conveyance Act of 1845, which provides that: "Deeds and other instruments relating to or affecting the title to real estate in this State, shall be recorded in the County in which such real estate is situated," etc., relates to wills; because they are instruments affecting the title to real estate.

This section, like section 30, relates only to the recording of *original* instruments, and had no relation to copies.

The act of Feb. 14, 1857, which provides for the recording of certified copies of wills from the records of other States, was the *first* and only authority given for recording such copies. This act went into effect subsequent to the purchases of any of the lands in controversy, by the grantors of the defendants in error. And their purchases were not in any event effected by such act; nor were they harmed because a certified copy of the will was not recorded after the act took effect.

The act was prospective, intended to operate *in futuro*, and not retrospective. It could not be given a retrospective operation unless by the terms of the act a retrospective intent was intended by the Legislature; and this intention, to give it that effect, must be manifested by clear and unequivocal expression.

Thornton v. *Alexander*, 11 Ill., 54;

Knight v. *Begole*, 56 Ill., 122;

McHaney v. *School Trust.*, 68 Ill., 140;

Wall v. *Kirby*, 15 Ill., 200;

Hatcher v. *T., W. & W. Ry. Co.*, 62 Ill., 477.

In *Gage* v. *Nichols*, 135 Ill., 129, 134, the Court say:

"The general rule applicable to all laws is, that they are to be regarded as prospective, only, unless the legislative intention that they should have a retrospective operation is manifested by the most clear and unequivocal language. (*In re Tuller*, 79 Ill., 99.) In *the People ex rel.* v. *Thatcher*, 95 Ill., 109, it was held, that the amendment to the revenue law then under consideration had no application to taxes assessed and levied before the amendatory act took effect. And in *Buck* v. *The People ex rel.*, 78 Ill., 560, the objection was that the local taxes were not levied and returned to the clerk in time, and it was, in substance, held, that the amendment now in question, did not apply to taxes levied under the law as it stood in 1872."

We insist that the act of 1857 only applies to such foreign wills as were probated in other States, or which took effect by the death of testators after the act became a law. It had no retrospective operation.

Defendants as Innocent Purchasers.—If the defendants or those under whom they claim title had been in actual possession of the lands in controversy for twenty years without notice, as provided in Section 1 of the Statute of Limitations, or if they had been in actual possession, under claim or color of title made in good faith, and for seven successive years continued in such possession, and during said time paid all taxes legally assessed, as provided in Section 6, no one would question that they would be entitled to hold the lands against a recovery in all cases where there is a present right of possession during the period for which the statue is required to run, and its requirements performed. But as to reversioners or remain-

der-men, during the existence of a prior estate, such limitations do not run; because, as we have shown, during that period the reversioner or remainder-man has no right of entry or action.

If the reversioner claims under a deed, as in the case of *Dugan* v. *Folliett*, and he neglects to have it recorded, and thus give notice to creditors and subsequent purchasers, who have no other notice, he is thereby guilty of *laches*, and under the Conveyance Act his deed was held to be void as to them.

In the *Dugan Case*, as the remainder-men claimed title under the deed, it was their duty to have the same placed of record in the County where the land is located. In default of doing so, they may have been guilty of *laches* which under the statute rendered their deed void as to creditors and subseqent purchasers without notice. In the cases at bar the plaintiffs do not claim under the will as devisees or otherwise; but claim as reversioners; and it was not their duty to have a certified copy of the will recorded, even were it conceded that the statute of 1857 was retroactive in effect, and required it to be recorded subsequent to the act, and subsequent to the sale of the lands to the grantors of the defendants. That duty, if any, devolved upon Mrs. Lewis, as devisee of the life estate, or those claiming under her. If any one were guilty of *laches*, it was those claiming under the will.

At the dates of the death of Romeo Lewis, the sale for taxes, the procuring of the tax deed, the passage of the act of 1857, and the sale by Mrs. Lewis to the several defendants' grantors, it could not possibly have been known or ascertained who would be the heirs of Romeo Lewis at the death of Mrs. Lewis.

They were an undeterminable, fluctuating class of persons, liable to be diminished or increased by deaths and births before that event occured. In fact, the records show that many who were the heirs during those periods have entirely disappeared. Harry Lewis and his descendants all died before Mrs. Lewis, and their contingent interests ceased. Susan North Dew, one of the heirs, died since the commencement of these suits, and others heirs, her descendants, have come into existence. Until Mrs. Lewis died there was barely a contingent or possibility of reversion to the heirs. And to hold that they, or either of them, were guilty of *laches* in not suing out an injunction, or applying for a receiver on the ground of waste, or in not procuring a copy of the will, under which they made no claim, to be recorded, would be, to say the least, a strained construction of the law.

It is true, that the plaintiffs introduced the will in evidence, but, as announced, it was not for the purpose of claiming title thereunder, but for the limited purpose of showing that the interest of Mrs. Lewis, was merely a life estate; and that it was her duty as such to pay the taxes; and that the procuring of the sale of the lands for taxes, the bidding the same in by her brother-in-law, Roots—having the certificate of purchase assigned to herself,—and obtaining a tax deed thereon were in effect the payment of the taxes in that irregular and questionable manner. She simply performed a duty she was bound to perform, and in legal contemplation simply paid the taxes in that way.

The defendants, by acquiring title from Mrs. Lewis, obtained no greater interest than she possessed. They stand in her shoes; and neither they

nor Mrs. Lewis could commit any act, or omit to perform any duty which would defeat the estate of remainder or reversion.

In *Orthwein* v. *Thomas*, 127 Ill., 555, 560, the Court held, that until the death of the life tenant, no statute of limitation will begin to run against the remainder-man, and *laches* will be imputed to him only from the time his right of entry accrues. The Court, at page 569, in the opinion, say:

"*No word spoken or act performed* by Thomas Osborn, (the life tenant), or those claiming under him, during the existence of his life estate, could in the least affect the rights of those entitled to the possession upon the termination of his estate. * * * True, Osborn and his immediate grantees, in 1837, and following the forms of law, laid out and platted a town upon survey No. 764; but it was impossible that he should grant or convey thereby any greater interest than he possessed."

Chancellor Kent says, that "Where a tenant for life, who has a limited interest, gets an advantage by being in possession or behind the back of the party interested in the subject he shall not retain the same for his own benefit, but hold it in trust."

Holridge v. *Gillespie*, 2 Johns., Ch. R., 30;

Baker v. *Whiting*, 3 Sum. R., 476.

Mrs. Lewis was bound to protect the interests of those who stood in the same relation with herself to the property, and could not take a tax title to their injury.

Berhans v. *Van Sant*, 7 N. Y., 523.

In the case just cited, the life tenant purchased the land for the non-payment of taxes and attempted to set it up as against the reversioner; and it was held

that it could not be done. "*Neither can those who claim under her do so.*"

The defendants introduced the tax deed of Mrs. Lewis simply as a *claim or color of title*, in order to furnish a basis for occupancy, payment of taxes, and thereby a title under the Statute of Limitations. This being the case, they would be required to show that the color of title is an honest one; and in addition thereto, that it was in fact something more than the life estate of Mrs. Lewis. If she had only a life estate how could she convey to the defendants a greater estate? And the fact that she attempted to convey a greater estate by giving a warranty deed purporting to convey the fee, does not in any manner affect the remainder-men or reversioners. This is expressly held in *Barrett* v. *Stradl*, 73 Wis., 385, and cited and and approved in *Mettler* v. *Miller*, 129 Ill., 630.

As a part of our argument, we quote at some length from the opinion in *Barrett* v. *Stradl*, 73 Wis., 364, where the Court say:

"The principal contention of the learned counsel for the appellant is that the defandant cannot set up that he was in possession holding adversely by color of title asserted *in good faith*, because he entered and held by a conveyance from the grantee of Patrick Barrett, who had only a life estete in the premises, made during the life time of said Barrett. The claim of the learned counsel is that one who enters upon posseasion of real estate by deed from a person holding only a life estate in the primeses cannot, so far, at least, as those entitled to the reversion are concerned, be in possession under claim of title, holding adversely to them, within the meaning of the statute. The learned Circuit Judge held with the counsel for the plaintiff so far as to hold that the possession of the

defendant could not be advere as againts those owning the reversion during the lifetime of the person owning the life estate, either for the purpose of establishing a title to the land by adverse possession, or for etablishing a claim for improvements made on the land during the life of such person; and on the trial limited the defendant in the claim for improvements and taxes to such and were made and paid after the death of Barrett, the owner of the life estate, and before the commencement of plaintiff's action.

"The contention of the learned council for appellant, that a person entering into the possession of land under a conveyance from a person holding only a life estate therein cannot hold adversely to the person entitled to the remainder, during the lifetime of the per son owning the life estate, so as to set the Statute of Limitations running against the remainder-man, is well settled by the authorities in other states, and is fully recognized by this Court. See *Weisner* v. *Zaun*, 39 Wis., 189. The reason of the rule is based upon the fact, that the remainder-man cannot, during the life of the person holding the life estate, bring an action against the person in possession under such life tenant, to recover possession of the premises; and it would be absurd, therefore, to bar the right of the remainder-man by a possession which he has no right to object to, and to prevent which he has no remedy by action.

"We think it is equally well settled that when a persons enters under a deed from the person who holds the life estate, which on its face conveys an estate in fee, and when the grantor intends to convey the fee, and the grantee supposes he is getting a conveyance of the fee, the person entering under such deed holds in fact adversely to all the world, but he cannot avail himself of the rights of an adverse possession under the statute as against the remainder-man, during the life of the owner of the life estate, but immediately upon the death of the person holding the life estate such pos-

session, if continued, becomes adverse to the remainder-man. In the language of the Court in *Sands* v. *Hughes*, 53 N. Y., 294: "There is no rule which prevents a hostile title being acquired, or an adverse possession being originated, during the running of an assessment lease, (granting a limited estate,) which possession would ripen into a title in twenty years after the end of the term." See, also, *Christie* v. *Gage*, 71 N. Y., 193; *Milliard* v. *McMullen*, 68 N. Y., 345, *Fleming* v. *Burnham*, 100 N. Y., 1–12; 2 N. E. Rep. 905; *Jackson* v. *Schoonmaker*, 4 Johns., 402; *Clarke* v. *Hughes*, 13 Barb., 147; *Miller* v. *Ewing*, 6 Cush., 34; *Jackson* v. *Harsen*, 7 Cow., 323, 327; *Gernet* v. *Lynn*, 31 Pa. St., 94; 1 Am. and Eng. Encyclop. Law, 237, and cases cited in note 1, and 238, note 2. The rule established in the cases above cited was adopted by this Court in the case of *Weisner* v. *Zaun*, 39 Wis., 188–204. The reason of the latter rule is, that immediately on the death of the life tenant the remainder-man may maintain an action to recover the possession from the person in possession claiming adversely."

If it was necessary to record a certified copy of the will in 1842, and probated in 1843, by reason of the Act of 1857—enacted fourteen years later—that duty devolved upon Mrs. Lewis or those claiming under her; but no such duty ever devolved upon the plaintiffs, they not being devisees in the will, and making no claim of title under it.

Mrs. Lewis or some of her grantees did, on the 15th day of August, 1866,—fourteen days previous to the date of the deed from her to Absalom Dehority—procure a certified copy of the will to be recorded. This may not have been certified strictly in accordance with the Act of Congress, to entitle it to be admitted to record under the laws of Illinois, so as to become constructive notice as to subsequent purchasers, yet it was then regarded by some of the grantors of the

defendants in error as essential to their title or they would not have procured it to be recorded.

Notice Not Material.—We contend that the question of notice does not arise or become material in this controversy. The defendants do not claim to have title through a regular and direct chain of title from the United States. They simply claim under color of title made in good faith, actual possession, and payment of taxes for seven years, and the bar of the Statute of Limitations.

The records of the County, showing the date of the entry of the lands, the name of the owner and patentee, in whose name they were taxed, may not be constructive notice, yet they furnished the means for the ascertainment of the name of the owner and patentee, and other facts disclosed by the records.

It would be absurd to suppose that any one would purchase land without examining the title. The usual course for investigating title is an abstract of the public records or, as it is usually called, an abstract of the title; but in case this is not furnished, the duty of examining the records will devolve upon the vendee, and he is charged with constructive notice of every fact which such an investigation would have disclosed.

The duty of careful inquiry into the title is imposed upon the vendee by law, and this duty he cannot forego unless by reason of the representations of the vendor he is prevailed upon to do so. The law presumes that every man not being under any legal disability will make due investigation with respect to the thing he is about to purchase, and that he buys

with full knowledge of all the facts that such investigation would disclose; and while he is permitted to recover upon any express agreement that he may have taken by way of covenant, yet if he fails to so protect himself he buys at his peril and cannot afterwards be heard to complain unless some fraud has been practiced upon him.

In *Brush* v. *Ware*, 15 Pet., 93, the Court, at page 111, say:

"The question is not whether the defendant in fact saw any of the muniments of title, but whether he was not bound to see them. It will not do for a purchaser to close his eyes to facts—facts which were open to investigation, by the exercise of that diligence which the law imposes. Such purchases are not protected."

In *Reeder* v. *Barr*, 4 Ohio, 446, the Court say:

"The true rule upon this subject appears to be, that the law imputes that notice which, from the nature of the transaction every person of ordinary prudence must necessarily have."

The test generally applied by American courts has been whether the facts are sufficient to put a prudent man on inquiry, and whether an inquiry has been prosecuted with reasonable care and diligence. *Hull* v. *Noble*, 40 Maine, 459; *Littleton* v. *Giddings*, 47 Texas, 109; *Holms* v. *Chadbourn*, 45 Mo., 60; *Warren* v. *Swett*, 31 N. H., 332; *Briggs* v. *Taylor*, 28 Vt., 180; *Allen* v. *Pool*, 54 Miss., 323; *Blanchard* v. *Ware*, 43 Iowa, 530; *Edwards* v. *Thompson*, 71 N. C., 177; *Pell* v. *McElroy*, 36 Cal., 268. For whatever is sufficient to put a party on inquiry which would lead to the truth is in all respects equal to and must be regarded as notice; and if a purchaser acts in bad faith and will-

fully or negligently shuts his eyes against those lights which with proper observation would lead him to a knowledge of facts affecting the subject of his purchase he will be held to have notice of such fact. *Chicago etc. R. R. Co.* v. *Kennedy*, 70 Ill., 350; *Barnard* v. *Campau*, 29 Mich., 192; *Littleton* v. *Giddings, supra*; *Cunningham* v. *Patee*, 99 Mass., 248; *Anthony* v *Wheeler*, 130 Ill., 128; *Citizens Nat. Bank* v. *Dayton*, 116 Ill., 257; *Burt* v. *Coleman*, 89 Ill., 364; 4 Kent. Com. 179; Sugden on Vendors, Chap. 17, pp. 335–336; *Slattery* v. *Rafferty*, 93 Ill., 277.

The defendants and those under whom they claim, no doubt had their title examined by an attorney. It is presumed that they or those who made the examination for them in the exercise of ordinary skill and diligence examined the land book in the County Clerk's office to ascertain the date of entry and who was the patentee; and that they there learned that the lands were duly entered by, and patented to Romeo Lewis, in 1838; and from the tax books of 1844 and 1845, they in the same manner could and no doubt did learn that the lands, during the years 1844 and 1845, were listed in the name of Romeo Lewis, as patentee, and the then owner. These records were lights from which a diligent and prudent man could easily have ascertained the vital facts relating to the title, and it would be absurd to suppose that defendants' grantors had closed their eyes to these ascertainable facts, that they purchased the lands in the dark, without making an investigation as to the title of the vendor.

Again. The defendants and their grantors found upon the records of Woodford County the tax deed

from the Sheriff to Mrs. Lewis; and they no doubt as prudent men examined the deed and records to ascertain whether the tax deed was valid. If they did they must have found, and had *actual* as well as *constructive* notice that *no judgment was rendered in the Circuit Court of Woodford County against said lands* for the taxes of the year 1845, as erroneously recited in said tax deed, and for that reason it was absolutely void as a title.

The tax deed is dated May 16th, 1849, and the lands were then wild and unoccupied, and so continued until after the sale to the several grantors of the defendants,— some of them less than seven years after the date of the tax deed; hence, Mrs. Lewis could not have acquired *color of title by actual occupancy and payment of taxes* for seven successive years so as to be brought within Section 6 of the Statute of Limitations. Of this fact the defendants had actual notice, as appears by the 29th stipulation, and constructive notice from the records of the county, which show that the tax deed was void as a title.

When Mrs. Lewis, or her agent under the authority of a power of attorney, offered the land for sale, the natural inquiry of the proposed purchaser would naturally be from whom and how did she acquire title? They knew, or were bound to know as a matter of law, that she could only have acquired title by purchase, descent or devise in a will. To these facts they were put upon inquiry. They must have known or learned that Romeo Lewis was the patentee; that he resided at the time of his death in Butler County, Ohio; that his will was duly probated and recorded in that county; that Jane N. Lewis was

a devisee under the will, and had elected to take under its provisions. It would be more than absurd to suppose that they purchased the lands without making these inquiries, and they are presumed to have known these essential facts.

As there was no law at the date of the purchases by the several grantors of the defendants authorizing the recording of foreign wills, or a certified copy thereof, all the record that could be made of the will and its probate and recording was in Butler County, Ohio, where Romeo Lewis resided, and where he died; it was, therefore, the duty of the purchasers from Mrs. Lewis to inquire *at the domicil of the man who owned the lands*, and in whose name the same were patented, to ascertain if he was living, and if dead, whether he had made a will, and what were its terms and what relation he bore to Jane N. Lewis. In the absence of evidence of their having done so, it is fair to presume that they were fully advised as to the facts before making the purchase.

It is more reasonable to presume that the vendees as well as the vendor were illy advised as to the effect of the will, or the validity of the tax deed. It is, however, clear that Mrs. Lewis had doubts as to the extent of her title under the will, or she would not have fraudulently attempted to defeat the heirs of her husband by letting the lands go to sale for taxes, and then have the same bid in for her benefit and obtained a tax deed in the manner in which it was done.

The fact that the defendants and those under whom they claim may have *believed* that they were acquiring a good title is wholly immaterial. The

plaintiffs in error, whose hands were tied, being unable to assert title during the life of Mrs. Lewis, are not responsible for or to be prejudiced by the mistakes or neglects of the life tenant or those claiming under her. During the existence of the life estate Mrs. Lewis and her grantees had a right to use the lands as they saw fit, and in doing so they in no manner interfered with or affected the rights of the plaintiffs in error, whose contingent interests could not become vested until the experation of the life estate at the decease of Mrs. Lewis, without issue of her body.

The possession of Mrs. Lewis, or of the defendants in error, her grantees, was never during her life hostile, but was exactly in accordance with the testator's will.

The defendants in error *knew that the United States were the source of the title;* and that a patent had issued to some one. *They knew there was an outstanding title in some one,* and it was their duty to ascertain the name of the patentee, or the holder of the outstanding title. They new that the records disclosed these facts. They knew that Jane N. Lewis did not derive title from the Government, and they were put upon inquiry as to the source of her title. It would be absurd to claim that they did not know that Romeo Lewis was the patentee, and that Mrs. Lewis claimed under him.

IN CONCLUSION.

We submit the following propositions as the law governing these cases:

1. That the will of Romeo Lewis, deceased, is to be construed as devising to his wife, Jane N. Lewis, the real estate in controversy, for her natural life; and at her death, she having left no heirs of her body, the lands descended to the plaintiffs in error, as the only surviving heirs at law of the testator, in fee simple.

2. That the Statute of Limitations did not commence to run as against the plaintiffs, as reversioners, until July 11th, 1888, the date of the death of Mrs. Lewis; therefore, the plaintiffs are not barred of their right of recovery.

These are settled and fixed rules of property, and are binding and effectual in determining the rights and titles to real estate, and cannot be avoided, evaded, or frittered away by mere sentimentality or caprice. They have so long prevailed as to become thoroughly established, and it would produce infinite confusions and mischiefs to depart from them, for it would necessarily loosen the whole foundations of titles to real property, and unsettle all that constitutes safety, security and confidence in the administration of the law.

Sabin D. Puterbaugh,

Attorney for Plaintiffs in Error.

THOMAS MILLIKIN,
PALMER W. SMITH and
LESLIE D. PUTERBAUGH,
Associate Counsel.

APPENDIX.

STIPULATIONS FOR SUBMISSION OF CASES.

ROMEO LEWIS *et al.*

vs.

ABRAHAM BARNHART *et al.*

Error to Southern Division Northern District of Illinois

It is hereby stipulated and agreed by and between the parties in the above entitled cause, that the same may be submitted by both parties on printed arguments to be filed within the first ninety days of the said October term, A. D. 1891, of said Court, as provided in rule 20 of said Court.

It is further stipulated and agreed that the printed arguments filed in the above entitled cause shall be taken and considered in all the following entitled cases, to-wit:

No. 1212. *Romeo Lewis et al.* vs. *Joseph Phillips et al.*
No. 1213. *same* vs. *Andrew Johnson et al.*
No. 1214. *same* vs. *Onno Dirks et al.*
No. 1215. *same* vs. *Oliver Dye et al.*
No. 1216. *same* vs. *Celicia Boner et al.*
No. 1217. *same* vs. *Celicia Bone.*

SABIN D. PUTERBAUGH,
Attorney for Plaintiffs in Error.
ROBERT E. WILLIAMS,
Attorney for Defendants in Error

Written Stipulation substantially as above is filed in each of the above entitled cases.

OPINIONS OF JUDGE BLODGETT FILED.

The opinion of Judge Blodgett, filed in the case of *Romeo Lewis et. al.* v. *Abraham Barnhart et al.*, applicable to all the cases, appears on page 25, of the printed Transcript of the Record.

The case of *Romeo Lewis et. al.* v. *William F. Mohr*, being one of the series of cases brought by the plaintiffs to recover the lands in Woodford County, Illinois, of which Romeo Lewis died seized, was determed at the same term of the Circuit Court.

The opinion in that case is as follews:

ROMEO LEWIS *et al.*
vs.
WILLIAM F. MOHR, } *Ejectment.*

BLODGETT, J.—

This is an action of ejectment for the recovery of the West half of the N. E. Quarter of Section 3. Town 26 North, Range 1, East of the 3rd P. M., situated in Woodford County, Illinois.

This case was submitted to the Court, without the intervention of a jury, and the same statements of facts as that of the same plaintiffs against *Barnhart et al.*, heard and disposed of at this term, except, that the warranty deed from Mrs. Jane N. Lewis to John C. Mohr, dated February 8, 1853. conveying the lands in controversy in this case, under which deed defendant claims by mesne conveyances, contained at the end of the description of lands conveyed the following clause: "Said tract of land having been held by

Romeo Lewis, the deceased husband of said grantor, and to her devised in the last will and testament of said Romeo Lewis."

Under the familiar rule that a person claiming lands under a deed or paper title is bound by all recitals in his chain of title, (*Morrison* v. *Morrison*, 38 Iowa, 73; *Bank* v. *Carter*, 44 Ala., 115; *Reynolds* v. *Buckman*, 33 Mich., 80). I have no doubt that this recital put this defendant upon inquiry as to the contents of Mr. Lewis' will, and charges him with notice not only of the contents, but of the legal effects of the will; and the character of the estate which Mrs. Lewis tood under it; and also all that was done by Mrs. Lewis as executrix and devisee under the will,—in other words, this recital is in effect notice to the defendant that Mrs. Lewis only took a life estate under the will in the land conveyed by her to John C. Mohr; and, also, that she had elected to take under the will, thereby waiving all rights as heir at law under the laws of Illinois, of her husband, putting an end to all discussion in the case as to whether Mrs. Lewis' deed to John C. Mohr by enurement or otherwise operates to convey any part of the estate which she would have taken as heir at law of her husband.

I am also of opinion, that, whoever were the heirs at law of Mr. Lewis at the time Mrs. Lewis' life estate ended, took the estate in reversion, and, that, hence, the devise to Mrs. Lewis by the widow of Harry Lewis, who was one of the brothers of Romeo Lewis, which was made many years before the death of Mrs. Jane N. Lewis, did not operate to clothe Mrs. Jane N. Lewis, with any part of the fee of the estate.

A finding that the defendant is guilty, as charged in the declaration, and that the plaintiffs are entitled to the estate in fee simple, must therefore be entered.

Filed, October 21, 1890.

W. H. BRADLEY, Clerk.

By E. P. SLOAN, Ch. Dep.

No. 1211 to No. 1217 Inclusive.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, A. D. 1[illegible]

ROMEO LEWIS, et al.,
Plaintiffs in Error,

vs.

ABRAHAM HARSHAW,
JOSEPHUS R. [illegible],
Defendants in Error.

ERROR TO SOUTHERN DIVISION OF NORTHERN DISTRICT OF ILLINOIS.

ARGUMENT FOR DEFENDANTS IN ERROR.

W. G. RANDALL,
W. S. GIBSON,
C. L. CAPEN,
of Counsel.

ROBERT E. WILLIAMS,
Counsel for Defendants in Error.

Nos. 1211 to 1217 Inclusive.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1891.

ROMEO LEWIS, et al.,
Plaintiffs in Error,

vs.

ABRAHAM BARNHART and
JOSEPHUS A. GISH.
Defendants in Error.

ERROR TO SOUTHERN DIVISION OF NORTHERN DISTRICT OF ILLINOIS.

ARGUMENT FOR DEFENDANTS IN ERROR.

ROBERT E. WILLIAMS, Counsel for Defendants in Error.

There are seven cases submitted, being numbers 1211 to 1217, inclusive. The last six cases in all essentials are precisely alike. The slight difference between them and No. 1211, the case against Barnhart & Gish, will be hereafter noted. These cases are in ejectment, brought in November, 1889, by the remote collateral heirs of one Romeo Lewis, who died in 1843, in the state of Ohio, to recover lands against parties who, with those under whom they claim have been in actual adverse possession, under claim and color of title in good faith, and have paid all taxes from the following dates, which dates are shown in the rec-

ord in each case, only the record in two cases being printed: No. 1211, under bond dated June 21, 1856, deed made in pursuance of the bond August 31, 1866—possession 35 years under bond, 25 years under deed; No. 1212, 32 years under deed; No. 1213, possession under bond 32 years, under deed 25 years; No. 1214, possession under bond 33 years, under deed 25 years; No 1215, possession under deed 29 years; No. 1216, possession under deed 33 years; No. 1217, possession under deed 33 years.

I.

THE STATUTE OF LIMITATIONS IS A COMPLETE DEFENSE TO THE ACTION.

As twenty years actual adverse possession without color of title—Section 1, Chapter 83, Starr & Curtiss' Statutes of Ill., Vol. 2, page 1536, or seven years possession under claim and color of title in good faith and payment of taxes, Sec. 6, p. 1529, bars the action; it is manifest that unless there is something to prevent the running of the statute, the actions are barred; and there is no error in any of these judgments of which plaintiffs in error can complain, and they should be affirmed. The Court below held that the actions were barred. If this holding is not erroneous, there is no error in any of the judgments, and this being the main point in controversy, I will first address my argument to it. The first 60 pages of the lengthy argument of the learned counsel for plaintiffs in error is addressed to the construction of the will of Romeo Lewis. To show that the Court below *did not err* in giving it the construction contended for by plaintiffs in error in the Court below and in this Court—that is, that the will created an estate tail at common law, which by the statute of Illinois is converted into a life estate in the first taker and fee

simple in the person to take after the death of the first taker, and that the fee remained in abeyance until the death of Mrs. Lewis, the first taker. So that if the Court did not err in holding that the actions were barred, it did not commit any error of which plaintiffs in error can now be heard to complain. I will postpone the answer to the first 60 pages of the argument and proceed to answer *what is complained of as error* in the Court below. It will be perceived on examination of the record that there were no disputed facts in the cases. The cases all being submitted upon an agreed statement of facts, which will be found on the record commencing at page 7, it is deemed not necessary to repeat them here. Did the statute of limitations begin to run before the death of Mrs. Lewis? I am not contesting the proposition that ordinarily the statute does not begin to run against the remainder man until the termination of the life estate. But are there any exceptions to that rule? And do the facts of these cases bring them within the exceptions? These are the exact points passed on by the Court below and to be passed upon by this Court. The Court below found that the actions were barred. It will be seen by the agreed statement of facts that the defendants had been in actual possession and paid all taxes for the times as above stated, and that no one of them had any notice, either actual or constructive, of the existence of the will of Romeo Lewis until the commencement of these suits, unless the recording of what is claimed to be a copy of the will on the deed records of Woodford county, Illinois, the county in which the land lies, on the 15th of August, 1866, or the auditor's return of the land for taxation, or the records of the land office of the entry of the land, or the records of the Probate Court of Ohio should be construed to be constructive notice. There were eleven cases in all submitted to and decided by the Court below—ten of them in favor of the defendants, and one, that of Mohr, in favor of the plaintiffs. This

is mentioned to explain that in the stipulation the fact of the deed of Mohr being constructive notice of the will is only applicable to his case, and not to any of the seven now before this Court. It will be perceived that the record of what is claimed to be a copy of the will was of a later date than all the deeds under which defendants' claim, except the deed to Dehority, under which Barnhart & Gish claim, which deed is dated about fifteen days after the date of said so-called record of the will, and this is the only point in which this case differs from any of the others, but this deed is based upon and made to carry out a bond that gave a title in equity 33 years old.

The fifth section of the Recording Act of Illinois [Rev. Stat. of 1833, pp. 587–8] is as follows:

"SEC. 5. That from and after the first day of August next, all deeds and other title papers, which are required to be recorded, shall take effect, and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers, without notice, and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers without notice, until the same shall be filed for record in the county where the said lands may lie."

This statute, as re-enacted in 1872, has been construed by the Supreme Court of Illinois in a case almost on all fours with this—*Dugan vs. Follett*, 100 Ill,, 581—and it is respectfully submitted that unless this Court directly overrules the Supreme Court of the state where the land is situated, in a case construing the statutes of the state, and which has become a rule of property in the state, these judgments must be affirmed. *Dugan vs. Follett* goes further than is necessary to sustain these judgments. In that case land was conveyed by deed to Mrs. Jennings for life, with remainder in fee to the six children of her former husband, Errick Rhodes. This deed had never been placed on record. Mrs. Jennings and a part of the children of Errick Rhodes had conveyed the lands to Franklin Rhodes, which title, by regular

mesne conveyances, had passed to the defendants. After the death of the tenant for life, Mrs. Jennings, the other children of Rhodes who had not joined in the deed, commenced proceedings in partition against the defendant, who claimed the whole under his deed from Mrs. Jennings and the others as color of title, made in good faith, and actual possession and payment of taxes for more than seven years, and claiming that the action was barred under the 6th section of the statute of limitations of Illinois—Starr & Curtiss' Statutes, Vol. 2, page 1539—which has been the law in Illinois since very early in the history of the state, and is as follows:

"Every person in the actual possession of lands or tenements under claim and color of title made in good faith, and who shall for seven successive years continue in such possession, and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements to the extent and according to the purport of his or her paper title. All persons holding under such possession by purchase, devise, or descent, before said seven years shall have expired, and who shall continue such possession, and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefits of this section."

And the question as to whether the statute of limitations had run, was the exact question to be decided by the Court. A much stronger case against the running of the statute was made in that case, than in the case at bar. First, It was contended that as the plaintiffs and defendants in that case were tenants in common, the possession of one was the possession of all; that the possession of defendant was not adverse and therefore that the statute had not begun to run. Second, That the proceedings in chancery under which the deed to Mrs. Jennings was executed, was constructive notice. Third, That as Mrs. Jennings had only a life estate, the statute could not begin to run until the termination of her life estate. The Court says on page 589:

"It is a fundamental principle in the law of limitations that the statute never commences running until the right of entry accrues, and since by the limitations of the deed from Hugh Rhodes to Mrs. Jennings, under which appellees claim, their right of entry did not accrue until her death which occurred less than seven years before the commencement of the present proceedings, it would seem to follow that this proceeding is not barred by the limitation act of 1839" [the act above quoted] "and such undoubtedly would be the case if that deed had been properly recorded, or if appellants and those under whom they claim had purchased with notice of appellees' rights. But that deed was never recorded and as already stated, there is nothing to show that appellants or their immediate grantors had notice of its existence."

The Court then discusses whether that deed to Mrs. Jennings having been made in pursuance of an order of the Court of Equity and reported to that Court, was constructive notice of the existence and contents of the deed, and held that it was not. And, further holds that as defendant had claimed to own the whole, that fact was an ouster of their co-tenants and the fact of being co-tenants did not prevent the running of the statute. The Court further proceeds on page 591, as follows:

"It is further said that the tenant for life is bound to pay all taxes and since appellants succeeded to the life estate of Mrs. Jennings, they were legally bound to pay the taxes, and hence they could not avail themselves of the limitation act of 1839. Conceding such would have been the case if the Jennings deed had been put upon record, or if appellants and those under whom they claim had purchased with notice of that deed, yet appellants claim, as we have already seen, adversely to appellees, and independently of any rights acquired through the Jennings deed, and insist that inasmuch as that deed was not placed upon record, and they did not otherwise have notice of it, they are not to be affected by its provisions; and in this we think they are right. The recording and limitation laws are both a part of the law of the State, and of equal force and validity, and the Court should so construe and apply them as to effectuate the objects and purposes of the Legislature in adopting them. The 30th section of chapter 30 of the Revised Statutes, entitled 'Conveyances,' provides that all deeds, mortgages, etc., shall take effect and be in force from and after the time of filing the same for

record and not before, as to all creditors and subsequent purchasers without notice, and all such deeds shall be adjudged void as to all such subsequent purchasers without notice until filed for record. To hold that appellants under the facts in this case are to be affected in any manner by the Jennings deed, would be to simply disregard this plain provision of the statute, which we are not permitted, or inclined to do. In construing and giving effect to the limitation laws, courts must do so in such manner as to also give effect to this plain provision of the statute making all deeds void as against subsequent purchasers without notice until filed for record."

The learned counsel for plaintiff in error says in his argument that plaintiffs do not claim under the will of Romeo Lewis, that they simply gave it in evidence, "for the sole and limited purpose of showing that Mrs. Lewis had a life estate, and therefore could take nothing by her tax deed, and that limitation did not run against them." Without this will, plaintiffs would not have a shadow of a case. Plaintiffs were not the sole heirs of Romeo Lewis at the time of his death, which date would have fixed the heirship in the absence of the will. Under the heirship as it existed then, plaintiffs in error, it is manifest, would have been entitled to only two-thirds of one-half of the land. Mrs. Lewis, there being no descendants, would have taken by the law of Illinois, as heir of her husband, one-half in fee. See Revised Statutes of Illinois, 1845, Sec. 46, page 545, which provide that the estates of intestates shall pass as follows:

"When there shall be a widow and no child or children, or descendants of a child or children of the intestate, then the one-half of the real estate and the whole of the personal estate shall go to such widow as her exclusive estate forever."

This statute has been the law of Illinois certainly ever since the revision of 1833—and was the law at the time of the death of Romeo Lewis—thus giving plaintiffs without the will, claiming simply as heirs of Romeo Lewis, but one-third instead of the whole, and secondly, but for the will there could not have been a

question but that the bar of the statute of limitations would have been complete. The will, then, is a muniment of the title of plaintiffs in error, if they have any title, and the recovery by them would be impossible without producing the will. We cannot appreciate the force of the argument of counsel for plaintiffs in error in saying his clients do not claim under the will, "but claim as contingent reversioners." If a party introduces in evidence an instrument without which he could not possibly recover, it seems to us he is estopped from denying that he claims under it. There is a very simple test of the question. Could they recover without it? And how did they become contingent reversioners except through the will?

How did the law of Illinois stand before 1857, as to the recording of wills? The second section of the statute of wills [Rev. of 1833, page 612] provides how home wills shall be proven, and goes on to say:

"* * * and every will, testament, or codicil, when thus proven to the satisfaction of the Court of Probate, shall be recorded by the judge thereof, in a book to be provided by him for that purpose, and shall be good and available in law for the granting, conveying, and assuring the lands, tenements, and hereditaments, annuities, rents, goods and chattels therein, and thereby given, granted, and bequeathed."

And section 7 of same act, page 614, provides:

"SEC. 7. All wills, testaments, and codicils, or authenticated copies thereof, proven according to the laws of any of the United States, or the territories thereof, or of any country out of the limits of the United States, and touching or concerning estates within this state, accompanied with a certificate of the proper officer or officers that said will, testament, codicil, or copy thereof was duly executed and proven, agreeably to the laws and usages of that state or country in which the same was executed, shall be recorded as aforesaid, and shall be good and available in law in like manner as wills made and executed in this state."

Section 16 of the same act, page 616, is as follows:

"SEC. 16. All original wills, after probate thereof, shall be recorded, and remain in the office of the judge of probate of the

proper county, and authenticated copies thereof, certified under the hand and seal of the said judge, shall be admitted as evidence in any Court of law or equity in this state."

And section 5 of the recording act [Revised Statute 1833, pp. 587–8] is as follows:

"SEC. 5. That from and after the first day of August next, all deeds and other title papers, which are required to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers, without notice, and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers, without notice, until the same shall be filed for record in the county where the said lands may lie."

The effect of which statutes was to make a will inoperative in this state, as a conveyance, until the will, with its probate, if a domestic one, was proved and recorded in the Probate Court of the proper county; and a foreign one equally inoperative to pass title until a certified copy thereof, accompanied with a certificate of the proper officer or officers, that said will, testament, codicil, or copy thereof, was duly executed and proved, agreeably to the laws and usages of that state or country in which the same was executed, shall be recorded as aforesaid, and shall be good and available in law in like manner as wills made and executed in this state.

This was the law at the date of the death of Romeo Lewis. The supposed copy of the will recorded in Woodford county in 1866, is not a record, as it does not show any probate; and is not an exemplification of the record, under the law of Congress, and is not certified by the clerk of the Ohio Court, as properly executed and proved, agreeably to the laws of Ohio, and was never recorded in the Probate Court of Woodford county, to be available as a conveyance under the statute of 1833.

After the will was probated in Ohio, a duly authenticated, certified and recorded copy in Illinois as aforesaid, had the same

effect in Illinois as in Ohio. It was admissible in evidence in the courts of Illinois by any one claiming under it; it became a muniment of title to property in Illinois; it was an instrument affecting the title to real estate, and as such came expressly within the language of the act permitting it to be recorded. The contention of the counsel for plaintiff in error is that this record of the probate of the will was not permitted to be recorded until the passage of the act of 1857 specially mentioning wills. In this, counsel is manifestly in error; as the above statutes not only provide that the will shall be recorded, but states *where*, and provides that it shall not pass title to real estate in this state until it is so *proved*, *certified*, and *recorded*. It will certainly not be contended that a will made in this state, devising lands, could not have been recorded prior to 1857, and if so, a will made in another state could have been recorded in like manner. This will could have been recorded at any time after its probate and its record would have given to the world notice of its contents; but it is not contended by plaintiffs' counsel that it could not have been recorded after February, 1857, and the statute then began to run if not before—and this was thirty-two years before the commencement of these actions and the bar of the statute had become complete. The law of 1857 was not retroactive, because the law before that time required foreign wills to be recorded both in the probate and recorder's office; and, we might add, that the defendants all paid for their land after the passage of this act of 1857. This will being an instrument permitted and required to be recorded, it was void for all purposes whatever as against purchasers, without notice, until it was filed for record. It is attempted to show that it was recorded in 1866. It was not; and was rightfully so held by the learned district judge for two reasons. First, It did not show any order of

court admitting it to probate, and it was not certified according to the act of Congress, nor of the Illinois statute. It would not have been notice, even if the record had shown its probate, and been properly certified, without further evidence. It did not describe any land. It merely spoke of the testator's lands in Illinois, without giving any further description. Had the patents for the land been recorded, and then a properly certified copy of the probate of the will been recorded, it would, under the laws of Illinois, have been constructive notice to any one after that, of the effect of the will on the title to the lands in controversy in these suits. Whether plaintiffs might have instituted any kind of legal proceedings or not, it is manifest that they could have had the record of the probate of the will duly certified and the patents to the land recorded, and if they thought they had, or might have, an interest in the land at the death of Mrs. Lewis, it was clearly laches in the heirs presumptive not to do this much, to give the world notice of their expected interest, and thus prevent innocent purchasers from being deceived and defrauded as to the title. There was nothing of record to connect Romeo Lewis to these lands in any way; he was an entire stranger to it. They might have done more. That the Court below was right in holding "but it does not follow that because they (the plaintiffs) had no right of entry, they or those under whom the present plaintiffs claim had no right to protect their possible estate in reversion; *they could have enjoined Mrs. Lewis or any one claiming under her from committing waste;* and if Mrs. Lewis neglected or refused to pay the taxes and suffered the property to be sold for taxes, thereby endangering the title in fee, they could have filed a bill in equity and had the property placed in the hands of a receiver with power to redeem from such sale. Story's Equity Juris., Sec. 913 et seq. High on Receivers, sections 11 and 672."

This has been expressly decided by this Court in *Pike vs. Wassell*, 94 U. S., 711. It was there held that the heirs of one whose property had been confiscated, under the act of Congress, could take proceedings in court to protect the fee. This Court says on pages 714–15: "Either they or their representatives, must take the title when their father dies. If they do not hold the fee they are certainly the only persons now living who represent those for whose benefit the joint resolution of Congress was passed. They at least appear to have the estate in expectancy. Under these circumstances as there is no one else to look after the interests of the succession, we think, they may properly be permitted to do whatever is necessary to protect it from forfeiture or incumbrance. The defendants admit that they have determined not to pay the taxes upon the property; the danger of incumbrance by reason of this failure to perform their duties as tenants for life is therefore imminent, and the case a proper one for a court of equity to interfere and grant appropriate relief. In *Carrins vs. Chabut*, *supra*, when the tenant for life failed to keep down the taxes and order was made for the appointment of a receiver of so much of the rents and income of the estate as should be necessary to pay off and discharge the amounts then in arrear. We see no reason why similar relief may not be granted in respect to the accruing taxes in case the tenants fail to perform their duties in that behalf." The same doctrine is held in *Illinois Central R. R. Co. vs. Bosworth*, 133 U. S., 92. See page 102. We submit this as an answer to the argument of counsel for plaintiffs in error that the statute of limitations could not run unless laches could be imputed and that plaintiffs could not be guilty of laches because there was nothing they could have done, to have protected their contingent interests. They might not only have instituted all necessary legal proceedings to have preserved the title to the fee

intact, and they might have given notice to the world of the contents of the will by having its probate and the patents to the land recorded in the county where the land lies, and in not doing either of these they were manifestly guilty of laches, and cannot now be permitted to take the land from innocent purchasers. It is respectfully submitted that *Dugan vs. Follett, supra* was a much stronger case than this, and that these judgments cannot be reversed without directly overruling that decision, which is believed to be sound in itself and is a rule of property in this state. It has not been shaken in the least by any subsequent decision in Illinois known to me. It is cited with approval in *Stafford vs. Stubbs*, 117 Ill., 389.

The case of *Mettler vs. Miller*, 129 Ill., 630, and *Rohn vs. Harris*, 130 Ill., 525, are cited by plaintiff's counsel as contrary to *Dugan vs. Follett*, but we submit that they are entirely in harmony with it. In Mettler's case both parties claimed, through a common source, to-wit, Maria Ross. One side claiming under a deed from two of the heirs at law of said Maria Ross, and the other side claiming under a deed from said Maria Ross and her husband, Isaac Ross. The acknowledgment of this deed was defective and did not convey the fee which was in Maria Ross, but the deed did convey the curtesy or life estate of her husband, and the parties claiming under that deed were only in for the life estate of Isaac Ross; but that defective deed was of record and was one link in the chain of title, and that made it constructive notice of the effect of the deed to convey only a life estate.

And in *Rohn vs. Harris*, it is said, "The various deeds and wills were upon record, so that each purchaser had notice of the title under which he occupied the property." Both these cases are in perfect harmony with *Dugan vs. Follett.*

The following cases are also cited by counsel for plaintiffs in error:

In *Higgins vs. Crosby*, 40 Ill., 260, both parties claimed under Ann Wright, one under a deed from her and her husband, which was void at the time; the other under a deed from her after she became sole. Plaintiff had actual notice of the terms of his deed and that it was void.

Steel vs. Gellatry, 41 Ill., 39, only holds that the statute does not begin to run against dower until the death of the husband.

Whiting vs. Nicholl, 46 Ill., 230, and *Miller vs. Pence*, 132 Id., 149, are to the same effect.

That the statute of limitations may run against the remainder man during the existence of the life estate is held by this Court in *Croxall vs. Shererd*, 5 Wallace, 268. The agreed statement of facts upon which all the cases were tried below admits that none of the defendants or those under whom they claim, except Jane Lewis, had any notice in fact of the existence of the will of Romeo Lewis, nor any constructive notice unless the attempted record of the will in 1866, or the entry of land in the County Court for taxation, or the entries in the U. S. Land Office, or the records of the Court that admitted the will to probate in Ohio, should be held to be constructive notice. The effect of the attempted record of the will in Illinois has been argued above. I will merely add on that point that counsel for plaintiffs in error assumes that that attempt to put the will on record was by one of the defendants. Counsel in this draws upon his imagination, for the record is silent as to who did it, and the reasonable presumption is that it was done by some one or more of the plaintiffs who are claiming a benefit by it and not by the defendants who did not know of its existence, *as is admitted* in the stipulation, and if they had known certainly did not desire it placed on record, as without it they had a perfect title. The defendants would certainly not place it on record with the object of throwing a

cloud over their title otherwise perfect. That the listing of the lands for taxes on the auditor's certificate in the County Court was not constructive notice, has been expressly and repeatedly decided by the Supreme Court of Illinois—*Betser vs. Rankin*, 77 Ill., 289, *Bourland vs. County of Peoria*, 16 Ill., 538, *Anthony vs. Wheeler*, 130 Ill., 128. There is no authority or reason or any decent pretense that the records of the land office, or the Court in Ohio, is constructive notice—constructive notice is by some recital in a deed or conveyance that a party must necessarily see in examining his title in the usual way. Judge Story defines it as "knowledge imputed by the Court on presumption too strong to be rebutted, that the knowledge must have been communicated."

—Story's Eq. Jur., Sec. 399.

Was the tax deed color of title? The learned counsel for plaintiffs in error seem to make no distinction between *title* and *color of title*. What is color of title is well settled in Illinois by a large number of decisions that have become a rule of property and under which a large part of the most valuable real estate in the state is held. It is simply this: Color of title is any conveyance that purports to convey the fee and it is presumed to have been taken in good faith unless the contrary is proven. *McCagg vs. Heacock*, 34 Ill., 476; *Woodward vs. Blanchard*, 16 Id., 424 (430); *Dickenson vs. Breeden*, 30 Id., 279 (325).

It might be added with regard to the attempt to record the will in 1866, if the record had been complete, and the patents to the land recorded, the only effect would have been to give notice to *subsequent* purchasers. It could not affect purchases made before. The purchases under which the defendants claim were all prior to that time, and all the deeds under which they claim were

made before that time, except the deed to Dehority, under which Barnhart & Gish claim, and that deed was made to comply with a bond made in 1856, and the defendants in that case had been in as innocent purchasers ten years before this attempted record; that this deed related back to the bond under which it was made, and fixes the character of the possession under it, is settled by the decisions of the Supreme Court of Illinois.

—*Snapp vs. Pierce*, 24 Ill., 156.

—*Sutherland vs. Goodnow*, 108 Ill., 528.

—*Schneider vs. Botsh*, 90 Ill., 577.

These cases show that possession under a bond or contract of sale is adverse as to all the world, except the vendor. The defendants had not only the tax deed as color of title taken in good faith with payment of taxes and possession of 7 years, but they had deeds from Mrs. Lewis, which were at least good color of title, under which they had held adverse possession for more than 20 years, which possession without even color of title would have made the bar of the statute complete. A purchaser from an heir without notice of a foreign will which is unrecorded will hold as against the devisee under the will.

—*Slayton vs. Singleton*, 72 Tex., 209.

—*Anthony vs. Wheeler*, 130 Ill., 128.

—*Bowen vs. Prout*, 52 Id., 354.

See also *Anthony vs. Wheeler*, *supra*, as to who is an innocent purchaser. It is then respectfully and confidently submitted that the statute of limitations began to run as soon as the defendants took possession, which possession was avowedly adverse from its beginning; that the will of which the defendants had neither actual nor constructive notice was to them null and void, and did not prevent the running of the statute; that the bar of the statute was complete before the commencement of the action; that the judgments are not erroneous and should be affirmed.

II.

IF, ON THE DEATH OF ROMEO LEWIS, THE FEE DID NOT VEST IN JANE N. LEWIS, AS DEVISEE UNDER THE WILL, IT VESTED IN HIS HEIRS-AT-LAW.

What we have said above is submitted as a reply to all that part of the argument of counsel for plaintiffs in error that attempts to show error in the decision of the Court below for which he claims the judgment should be reversed. Believing as we do, that there was no error in the rulings complained of, but that the learned Court below did err in his construction of the will on the two points: 1. That it only vested in Mrs. Lewis a life estate with contingent remainder in fee in the heirs of her body; and 2. That the fee not having passed by the will did not vest on the death of Romeo Lewis, but remained in abeyance until the death of Mrs. Lewis, and then vested in the plaintiffs who were at her death the surviving heirs of her husband. And if our contention as to the construction of the will, that it was a devise to a class, to Mrs. Lewis and her children, and she being the only one of the class surviving, on the death of the testator took the whole, then the judgment should not be reversed even should our other contention that the statute of limitations made a complete defense not be regarded as sound by this Court. Even should we be wrong on both of these points, we respectfully submit, with strong confidence, that the fee, if it did not wholly vest in Mrs. Lewis on the death of her husband, by virtue of the will, did vest in the heirs-at-law of her husband, subject to being divested on the birth of issue of her body, if by a proper construction of the will she was but tenant for life with remainder to the heirs of her body. That is, we claim, that the fee was not in abeyance but did vest on the death of Romeo Lewis, whether the will be construed as claimed by the contention of the plaintiffs in error

or by the defendants. In *Croxall vs. Shererd, supra*, this Court says:

"*It is when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate precedent estate. It is the present capacity to take effect in possession, if the precedent estate should determine, which distinguishes a vested from a contingent remainder.*"

Even if the will of Romeo Lewis only created in Mrs. Lewis a life estate with contingent remainder in the heirs of her body, the heirs of the testator took on the death of Romeo Lewis, Jane N. Lewis having no heirs of her body, at the time of the death of Romeo Lewis; his heirs were persons in being who could take, on the ceasing of the intermediate estate.

To the same effect in fact are all the cases, and if the will did create a life estate in Jane N. Lewis, with remainder in fee to the heirs of her body, that fee vested in the heirs at law of the testator on his death liable to be divested on the birth of an heir to the body.

We call attention to Blackstone's Com. II, 107, Note 8, in Chitty's Edition (Note 3 in Sharswood's Edition).

The text to which the note refers is as follows: "Thus in a grant to John for life, and afterward to the heirs of Richard, the inheritance is plainly neither granted to John nor Richard, nor can it vest in the heirs of Richard till his death, *nam nemo est haeres viventis:* It remains, therefore, in waiting or abeyance during the life of Richard."

This is the principal text and authority cited and relied upon by the counsel for plaintiffs. The notes of the two editors above referred to referring to this text, and which notes we shall show are fully corroborated by the mass of judicial decisions, are as follows: "The inheritance or remainder in such a case

has been said to be in abeyance, or *in nubibus*, or *in gremio legis*, but Mr. Fearne with great ability and learning has exposed the futility of these expressions, and the erroneous ideas which have been conveyed by them. Mr. Fearne produces authorities which prove beyond controversy that where a remainder of inheritance is limited in contingency by way of use or by devise, the inheritance in the meantime, if not otherwise disposed of, remains in the grantor and his heirs or in the heirs of the testator until the contingency happens to take it out of him. But, although, as Mr. Fearne observes, different opinions have prevailed in respect to the admission of this doctrine, in conveyances at common law, yet he adduces arguments and authorities which render the doctrine as unquestionable in this case as in the two former of uses and devises."

Kent's Com., IV, 257, says:

"If a contingent remainder be created in conveyances by way of use, or in dispositions by will, the inheritance, in the meantime, if not otherwise disposed of, remains in the grantor or his heirs, or descends to the heirs of the testator, to remain until the contingency happens. This general and equitable principle is of acknowledged authority. Conveyances to uses are governed by doctrines derived from courts of equity; and the principles which originally controlled them, they retained when united with the legal estate. So much of the use as is not disposed of remains in the grantor; and if the remainder in fee be in contingency, the inheritance or use, in the meantime, results to the grantor, and descends to his heirs, and becomes a springing or shifting use, as the contingency arises. The same doctrine is applied to executory devises; and the fee remains unaffected by the will, and goes to the heir, subject to be defeated when the devise takes effect, provided it takes effect within the period prescribed against perpetuities. Though the fee descends, in the interim, to the heir, there shall be an hiatus, as was observed in *Plunket vs. Holmes*, to let in the contingency when it happens. It was fully and definitely settled by Lord Parker, on appeal from the rolls in *Carter vs. Barnadiston*, that the inheritance descends to the heir, in the case of a contingent remainder, created by will, to await the happening of

the contingency. The only debatable question, according to Mr. Fearne, is whether the rule applies to conveyances at common law."

Hilliard on Real Property, I, 554, lays down the doctrine thus:

"4. So where a contingent remainder is *devised*, the fee descends to the heir; and even though a precedent estate for life is given to him, he takes such estate and the fee distinctly, in relation to the contingent remainder man, so that when the contingency happens, the heir's estate opens to let in the remainder."

Greenleaf's Cruise, Title XVI, Chap. VIII, Sec. 4, says:

"In the case of *Davis vs. Speed*, Lord Holt put this case: If a feoffment in fee is made to the use of A. and the heirs of his body begotten, the remainder in fee to the right heirs of T. S., who is then living, in such case, the fee simple is not in abeyance, nor in the feoffee; but the use of the fee shall result to the feoffor, and remain in him until the contingency, *viz.:* the death of T. S. shall happen."

And Sec. 12 of the same chapter, says:

"The preceding doctrine of the continuance of the inheritance in the grantor and his heirs, or in the heirs of the devisor, *are confined to conveyances by way of use*, and *dispositions by will;* for different opinions have prevailed in respect to its admission in conveyances at common law."

The authorities relied on by plaintiff, arise under deeds and not under wills, the only doubt as to the fee vesting, has arisen under deeds, not under wills.

In *Shapleigh vs. Pilsbury*, 1 Greenleaf, Me., 246, on page 256, the Court quotes with approval:

"Devise to A for life; and if A have issue male, then to such issue male and his heirs forever; and if A leave no issue male, then to B in fee. It was held by Lord Chief Justice Parker, that since construing the fee to be in abeyance would tend to destroy it, and since nothing but necessity in any case should occasion a fee simple to be in abeyance, he should abide by the opinion which had been given: That where the remainder was devised in contingency, the reversion in fee descended

to the heirs-at-law in the meantime. Vin. Abr. "Abeyance," B 15, 1 P. Wms. 505, 511,5 15."

In *Vint vs. The Heirs of King*, in the U. S. Dist. Court of West Dist. Virginia, reported in 2 Am. Law Reg. O. S., 712, the Court, Judge Brockenbrough, says: (p. 726)

"The cases cited are sufficient to show that this old notion of the fee being in abeyance where there is a contingent limitation in fee, until the contingency happens, a notion which was adopted by a no less celebrated writer than Blackstone himself, is an egregious fallacy and has been triumphantly exploded by Fearne. The argument of this latter writer, drawn from reason and authority, is close, logical, and unanswerable, and affords one of the most beautiful specimens of demonstration to be found in any legal work."

In *Gilpin and wife vs. Williams*, 25 Ohio St., 283, the devise was to A for life, with remainder to her children after her death in fee simple, and, in the event of her death, without children or their descendants, then to the heirs of her father, Thomas Williams, deceased, in fee simple. The question was, what became of the fee, pending the daughter's life. The Court says, on page 295:

"We do not believe it is in abeyance or that it rests *in nubibus*. It is clear that it is not in Euretta. Her only title is to an estate for her natural life. Nor in her children; she has none. It is not in the trustee, as we have assumed. The fee simple title was in the testator until his death, and if it did not pass, by his will, to any devisee therein named, it either ceased to exist in anyone, or it passed by way of descent to his heirs at law. In our opinion, it descended to the heirs, subject, however, to be divested by force of the will, in the event that Euretta shall die leaving children. But subsisting in the meantime in the heirs for the purpose of drawing the possession to them in the event of her death without children. This right in the heirs is an estate in reversion. It is the residue of the whole estate as owned by the father, not disposed of by his will. When the reversion takes place, the heirs will hold by virtue of the title which descended to them at the time of his death and not by virtue of any new title acquired by purchase. And, although their estate may divest on the happening of an uncertain event, it is now, nevertheless, a vested right."

In Vol. II, of Sharswood & Budd's Leading Cases, at page 347, the authors say:

"Mr. Fearne also holds that in the case of a contingent remainder created by a conveyance at common law, the inheritance will continue in the grantor (Fearne Cont. Rem., 360); and severely criticises the position of those jurists who hold to the contrary."

After quoting from this authority at considerable length, the authors close by saying:

"The reasoning of Mr. Fearne seems unanswerable, and may be said to have met with general acquiescence."

Washburn in his work on Real Property, Vol. II, page 263, says:

"It has at times been discussed, as something more than a mere matter of speculation, in whom the inheritance is, in the case of a limitation of a contingent remainder in fee, until the same vests by the happening of the contingency on which it depends. If the limitation be by the way of a use, there seems to be no question that it remains in the settlor as grantor, or in the heirs of the devisor, if created by last will. The doubt arises where it is limited by a common law assurance."

In *Waters vs. Bishop*, a case decided by the Supreme court of Indiana, March 14, 1890, and reported May 23, 1890, in Vol. 24, N. E. Rep., on page 161, the syllabus of the case, which is supported by the opinion by an able argument, is as follows:

"Testator devised land to his only child for life; then to her children, if any living at the time of her death, in fee, and if she died without issue, then to the heirs of his body then living. *Held*, that the fee vested in the daughter as heir, and would become vested in her issue, if any, at her death, and testator's sister and her descendants had no interest in the land."

Williams on Real Property, p. 204, says:

"Modern lawyers, however, venture to assert that what the grantor has not disposed of must remain in him and can not pass from him until there exists some grantee to receive it; and when the gift is by way of use, under the Statute of Uses, there is *no doubt* that until the contingency occurs, the use, and with it the

inheritance, result to the grantor. *So, in the case of a will, the inheritance, until the contingency happens, descends to the heir of the testator.*"

Bates vs. Gillett, 132 Ill., 287, on page 295, the Court uses the following language:

"According to the modern doctrine, there being no person *in esse* to take, the remainder vested on the death of the testator in his heirs-at-law, subject to be divested, when the will became operative as to such remainder."

—*Lambert vs. Harvey*, 100 Ill., 338.

— *Wood vs. Keyes*, 8 Paige, 364.

—*Miller vs. Miller*, 10 Met., 393.

—Williams on Real Property, *204.

—Tiedeman on Real property, Sec. 411.

—Fearne on Con. Remainders, *351; *513.

—*Miller vs. Chittenden*, 4 Iowa, 252.

—*Cook vs. Hammond*, 4 Mason, 467.

—*Gest vs. Flock*, 1 Green, N. J. Eq., 108.

—*Morton vs. Funk*, 6 Barr., 483.

—*Chambers vs. Wilson*, 2 Watts, 495.

—*Lyle vs. Richards*, 9 S. & R. 322 (372).

—*Egerton vs. Massey*, 91 E. C. L., 337.

—*Craig vs. Warner*, 5 Mack., 460.

Frazer vs. The Board of Supervisors, 74 Ill., 282, and *City of Peoria vs. Darst*, 101 Id., 609, are the only Illinois cases that have even a slight coloring in favor of plaintiff's contention as to when the fee vested. In *Frazer's* case, it will be perceived that the question was not when the fee vested or where it was during the lifetime of the grantee, Harriet Moss, but whether the grantor and grantee in the deed, by uniting, could cut off the heirs of the body, should any be born. The rule would be exactly the same, whether the fee remained in the grantor, until the birth of the heir of the body, or not; for, if it so remained, it was conditional,

and would pass to the heirs of the body, on the birth of one. The question for decision, and the only one, was, whether Moss and his daughter "could convey a *good, sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee simple.*" It was held they could not, and the Court decided that it is immaterial whether the fee was in abeyance or not. It will be recollected that this arose under a *deed, a common law conveyance*, and we have shown by our authorities that, although doubts had arisen in some Courts where the conveyance was by deed, yet where it was by will there was no doubt the fee vested in the heirs of the testator, until the contingency arose by which it might vest in the devisee.

And in *The City of Peoria vs. Darst*, 101 Ill., 609, it will be perceived that this case arose under a *deed*, and it was expressly provided in the *deed*, that the fee should not vest in the children of Mary M. Clark until her death. This case, we think, is really a strong one to show that the intent of the grantor, even by deed, much more so when by will, shall control, without regard to technical rules of construction. But the case of *Bates vs. Gillett, supra*, a much later case than *The City of Peoria vs. Darst*, is conclusive as to what the law of Illinois is, as to the vesting of a fee in the case of a contingent remainder.

The doctrine announced by this Court in *Croxall vs. Shererd, supra*, which is in harmony with the authorities above cited, would seem to be conclusive as the doctrine of this Court unless some case can be found to the contrary. Counsel for plaintiffs in error refers to *Wallack vs. Van Riswick*, 92 U. S., 202, as showing that the fee may be in abeyance. A glance at this case shows that it stands on peculiar grounds. To have allowed the fee to remain after the act of confiscation in the party committing the act of rebellion and giving aid and comfort to the enemy so that he could convey it and secure a benefit

which might be appropriated to the use of the enemy, would have defeated the whole policy of the confiscation act, and therefore the maxim of the common law that the fee could never be in abeyance must give way if necessary, to the higher policy of devoting the property of rebels to the support of the government, but it was not even there decided whether the fee was in abeyance or not. *Ill. Cen. R. R. Co. vs. Bosworth*, 133 U. S., 92, as we think, holds with the cases therein cited from this Court, that the judgment of confiscation and sale of the estate of the rebel still leaves the fee in the rebel but in a dormant state without any vitality, except to pass from him to his heirs at his death. But even if it should be held in case of con-

This, we think, shows conclusively that the fee vested on the death of Romeo Lewis either in Mrs. Lewis, as devisee under the will, or in his heirs-at-law.

But whether the fee would pass to the heirs of the testator at common law, or not, we contend that by the effect of the fourteenth section of the statute of wills of Illinois [Rev. Stat., 1845, p. 539], which is copied from the revised laws of 1833, page 615, § 13, if the fee in the estate of Romeo Lewis did not pass by his will to his wife, it was intestate estate. That section is as follows:

"Whenever a devisee or legatee in any last will and testament, being a child or grandchild of the testator or testatrix, shall die before such testator or testatrix, and no provision shall be made for such contingency, the issue, if any there be, of such devisee or legatee, shall take the estate devised or bequeathed, as the devisee or legatee would have done, had he or she survived the testator or testatrix; and if there be no such issue at the time of the death of such testator or testatrix, the estate disposed of by such devise or legacy shall be considered and treated, in all respects, as intestate estate." * * * * *

The facts of the case admit that there was a child living after the will was made. If plaintiff's contention is right, in his construction of the will, the fee would have passed to this child had it survived its father, and the fee was devised to this child. The child died without issue before the testator, thus making every condition required by the statute to make the fee pass as intestate estate.

The effect of the sixth section of the conveyance act of Illinois [Rev. Stat., 1833, p. 131], converting an estate tail at common law into a life estate in the first taker and a fee simple in the heirs of the body, is, that the *heirs of the body* are taken to mean the *persons* living at the death of the testator, who would be heirs of the body of the first taker, if living at her death, subject to let in after born persons who would make up the class of *heirs of*

the body of the first taker at her death, such *heirs of the body* then do not take under the Illinois statute as *heirs* but as *purchasers.*

There being a child of Jane N. Lewis living during the life of the testator, and after the date of the will, it matters not in fact whether born before or after the will was written. If it had survived the testator, and the will created an estate tail, it would, under the statute, have taken the fee as purchaser, subject to let in after born children.

If plaintiff's construction of the will is correct, this child was a devisee of the fee; it died before the testator; no provision was made in the will for such a contingency. This child left no issue, therefore the fee passed, as intestate estate of the testator, to his heirs at law by virtue of the above statute, even if not by the rules of the common law.

So that, in any view that can be taken of the case, we submit the fee did not remain in abeyance after the death of Romeo Lewis.

Lest we weary your honors by our references, we will conclude on this point, by asserting, that we believe that no text writer on real estate, or well considered decision can be found, but lays down confidently the doctrine as applicable to *wills*, that where the fee is left contingent, it descends to the heirs of the testator till the contingency arises, where it can vest otherwise, and that it is never in abeyance.

III.

WHO WERE THE HEIRS OF ROMEO LEWIS?

By Section 46 of the Statute of Wills [Rev. Stat. 1845, pp. 545–6] which is copied from the laws of 1833 [Rev. Stat. 1833,

p. 625, § 43], the widow, Jane N. Lewis, was an heir to one-half in fee.

—See *Brown vs Pitney*, 39 Ill., 468.

—*Sutherland vs. Sutherland*, 69 Id., 481.

—*Richard vs. Miller*, 62 Id., 417.

Romeo Lewis left one brother living, Harry Lewis, and the descendants of two deceased brothers.

Harry Lewis, by the agreed facts, afterwards died intestate, leaving a widow and one son. This son afterwards died, never having married, and intestate, and by the laws of Illinois, his mother became his sole heir. This mother devised this interest, if she had any, to Jane N. Lewis. This interest was one-third of one-half, or one-sixth, which added to the one-half that Jane N. Lewis took as heir, gave to Jane N. Lewis two-thirds, which is now vested in the defendants as the grantees of Jane N. Lewis under deeds with full covenants of warranty.

Does the fact that the widow elected to take under the will prevent her tading as an heir to intestate estate?

In *Ferguson vs. Stewart's Ex'rs*, 14 Ohio, 140, on page 147, the Court says:

"The fact that a provision has been made for the wife by the will, does not prevent her from being an heir."

This Ohio case has been approved by the Supreme court of Illinois repeatedly. *Richards vs. Miller*, *supra*; *Rawson vs. Rawson*, *supra*.

In *Richards vs. Miller*, 62 Ill., 417, the will after making provision for the payment of the debts of the testatrix, made bequests to her husband and to others, and in a residuary clause provided as follows: "I give, devise, and bequeath to my heirs-at-law, the remainder of my estate."

"It was also held in *Rawson vs. Rawson*, *supra*, that heirs-at-law, as used in a will, are such as are made so by statute, and are the persons upon whom the law casts the estate in case of intestacy; and that a widow was an heir-at-law under the statute, inheriting from her husband. The language of the statute which gives one-half of the real estate of the husband to the wife is identical with that which gives one-half of the real estate of a *feme covert* to her husband.

"We must, therefore, hold that the intention of the will was to include the husband as one of the heirs-at-law.

"Is this intention controlled by the context? The prior bequest to him should not have that effect. It has often occurred, that a testator has made special bequests to some of his heirs, and then bequeathed equally the residue of his estate to all of them. Good reasons may often exist for such disposition of an estate. Some of the heirs may have had larger advancements; the necessity may be greater to make more ample provision for one than another; or the love and affection which prompts the gift may be stronger in one case than another. The tie which linked together the husband and wife in this case was more sacred than the tie which bound her to her relatives. The better and kindlier feelings of the woman, and love enthroned in the heart of the wife, would prompt the gift to the husband, while only cold duty might induce the bestowal of anything upon her next of kin. It would be most unreasonable to infer, from this fact alone, the exclusion of the husband from any benefit from the residuary clause. See *Ferguson and wife vs. Stuart, Ex'r*, 14 Ohio, 140."

That the provision in the act concerning dower: "That every devise of land, or any estate therein by will, shall bar her dower interests," does not affect her capacity as heir to intestate

estate of her husband, is manifest, and is expressly held by the Supreme court of Illinois. The dower act and the statute of descents are different, and one does not affect the other. *Rawson vs. Rawson*, 52 Ill., 62; *Sutherland vs. Sutherland*, 69 Id., 481. It is then, respectfully submitted that the learned district judge erred, in holding as he did in the case of Mohr: "That she had elected to take under the will, thereby waiving all rights as heir-at-law, under the laws of Illinois, of her husband." In so holding, he directly overruled the Supreme court of Illinois, in cases construing the statutes of the state, and which have become a rule of property, in the state. This was erroneous. Nor do the citations of plaintiff's counsel from Redfield on Wills, or Bispham's Equity, in any way militate against our position, as we are not claiming anything as dower or contrary to the terms of the will. We are simply claiming where the whole or any part of the estate became or was intestate estate, it passed to the heirs-at-law, as provided in the statutes of descent of Illinois, and, if the fee did not pass by the will, it vested in the heirs-at-law, one of whom, and to the extent of one-half, his widow, Jane N. Lewis, was. See also *Russell vs. Minton*, 42 N. J. Eq., 123, and exhaustive note thereto.

IV.

THE CONSTRUCTION OF THE WILL.

Having replied to that part of the argument of counsel for plaintiffs in error relating to the vesting of the fee, we will briefly reply to his argument on the construction of the will.

We shall begin by quoting from Mr. Justice Miller in *Clark vs. Boorman's Ex'r.*, 18 Wallace, on pages 502–3:

"To these considerations it is to be added that of all the legal instruments, wills are the most inartificial, the least to be

governed in their construction by the settled use of technical legal terms, the will itself being often the production of persons not only ignorant of law, but of the correct use of the language in which it is written. Under this state of the science of the law as applicable to the construction of wills, it may well be doubted if any other source of enlightenment in the construction of a will is of much assistance than the application of natural reason to the language of the instrument under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution, and connecting the parties and the property devised with the testator and with the instrument itself."

The golden rule, the pole star to be followed in the construction of a will, is to give it the same meaning as was intended by the testator. To give effect to the intent of the testator, as that intent is gathered from the language of the will and surrounding circumstances is always to be done, unless the intent is to do something which the law prohibits. We know of but one exception to this general rule, and that is where the language brings it within the rule in Shelly's case, and there it almost invariably goes against the intent of the testator. It would be almost an idle ceremony to cite your honors to authorities in support of this position. We will, however, cite a few Illinois cases.

—*Bland vs Bland*, 103 Ill., 11.

—*Brownfield vs. Wilson*, 78 Id., 467.

—*Leiter vs. Sheppard*, 85 Ill., 242.

—*Osborn vs. Jefferson Nat'l Bank*, 116 Id., 130.

—*Kaufman vs. Breckenridge*, 117 Id., 305.

—*Hamlin vs. U. S. Ex. Co.*, 107 Id., 443.

—*Kennedy vs. Kennedy*, 105 Id., 350.

What then did Romeo Lewis intend to do with his estate by his will? We are placed in possession of the surrounding facts to enable us to look at the language of the will. First, It was written by himself, not being a lawyer. We know his family; he had no child living, but had had children and was in expectation

of more; he had an aged mother; had considerable property, consisting mostly of wild lands situated in different states.

He first provides for the care of his venerable mother, and gives certain money legacies to his nieces, then provides that his lands in Florida, Arkansas, and Mississippi be sold, and then by a residuary clause, gives the entire residue of his estate to his dearly beloved wife, Jane N. Lewis, and to the heirs of her body, to be equally divided between them, share and share alike.

Courts, in construing wills to give effect to the intent of the testator, make children and heirs of the body convertible terms. It is hardly deemed necessary to cite authorities in support of this; they are everywhere. We will, however, cite *Summers vs. Smith*, 127 Ill., 645. The Court says:

"It is always competent to show that the word *heirs* or *heirs of the body* are used in a will as synonymous with *children*, and for this purpose every part of the will is to be taken into consideration."

Now, that Romeo Lewis meant by "heirs of the body," children, cannot admit of a doubt, and he meant his own children. It is ridiculous to suppose that he was cutting off his wife with a life estate in wild lands to give the fee to children she might have by another man. He intended, after the payment of his debts and the support of his mother, and the payment of the legacies to his nieces, to dispose of the entire residue of his estate to his wife and such child or children as he might have, to be divided among them, share and share alike.

All the surroundings make this manifest. By the payment of his debts and legacies, all his personalty and the proceeds of the sale of his lands in Florida, Mississippi, and Arkansas, were exhausted, leaving his homestead in Ohio, and some unimproved lands in Illinois and Indiana, then of little value.

It cannot for a moment be supposed that a sane man who had an affection for his "dearly beloved wife," as he calls her in the will, would give her, charged with the support of his "venerable mother" and expecting her to still bear him children, a mere life estate in wild lands, without even the means of paying the taxes thereon, in order to provide for what might prove to be the heirs of her body by a future husband. Such a construction is too monstrous for belief, but if we substitute for the words "heirs of her body" the word *children*, which is permissible by all the cases, and then say he meant to leave her and his children by her, the residue of his estate to be divided among them, share and share alike, we shall do no violence to the language (as it is common for persons not acquainted with the technical legal rules to call children of living persons heirs of their bodies) and have a will that violates no rules of law or common sense or the dictates of prudence or affection.

Then it is to be observed that personal and real property are disposed of by the same words. This presumes a fee in the first taker.

—*Buffar vs. Bradford*, 2 Atkyns, 220.

—*Morrison vs. Semple*, 6 Binney, 94.

—*Johnson vs. Morton*, 10 Pa. St., 245.

Again, the will charges the wife, as executrix, with the support and care of the venerable mother, this is not a charge on the estate, but on the person of the wife, and this will convert a life estate into a fee.

—*Jackson vs. Marton*, 18 John., 31.

—*Packard vs. Packard*, 16 Pick., 191.

—*Spraker vs. Van Alstyne*, 18 Wend., 200.

And again, a devise of wild land always, in the absence of words to the contrary, presumes a fee.

—*Caldwell vs. Ferguson*, 2 Yeates, 380.
—*Sargeant vs. Towne*, 10 Mass., 303.
—*Ridgeway vs. Parker*, 10 Mass., 305.
—*Russell vs. Elden*, 15 Me., 193.
—*Sears vs. Cunningham*, 122 Mass., 538.

Again, in another clause of his will, giving one of his nieces a legacy of $1,000, he uses the same words. It does seem to us that taking this will with the side lights thrown upon it by the circumstances shown in the agreed facts, that what the testator meant is too plain to err in finding. That is, that he intended to divide his estate between his wife and children share and share alike; that they, as a class, would then take under the will as purchasers, and the wife, being the sole survivor of the class, took the whole.

We will not review the cases or argument of plaintiff's counsel in detail, but will state, if your Honor will read the cases referred to, you will find that the main ones relied on are decided on the express grounds, so stated in the opinions, that they could not be decided in any other way and give effect to the intent of the testator. They profess not to be carrying out technical rules, but simply refer to some cases to show that they might do as they did. This is true of *Sisson vs. Seabury*, and *Carr vs. Estell*, and *Doe on Dem. of Lang vs. Laming*, 2 Burrows, 1100, so much relied on by counsel for plaintiff. We will briefly refer to these three cases:

The distinction between the case at bar and *Sisson vs. Seabury*, 1 Sumner, 235, is, that the devisee, Philip Sisson, had no child during the life of the testator, and this is a very strong case to show that the pole star in construing a will, is to get at the intention of the testator. In this case the devise was to "A and his male children, lawfully begotten of his body,

and their heirs forever." Devisee had no children. Judge Story says that the intent of the testator is to give to the children. Can that intent be carried out? It can, by construing the whole clause to be to give a life estate to Philip Sisson with contingent remainder in fee simple to the children, but in no other way. It was so held that way to give effect to the intent of the testator. See page 243.

In *Carr vs. Estell*, 16 B. Monroe, 309, the decision is placed upon the express ground that in no other way could the intention of the testator be carried out. The devise was to M. B. D. and her children. She had no children during the life of the testator. The Court says that, in a devise to a person and his children, where the devisee had no child at the date of the devise, the parent takes an estate tail, which by the law of Kentucky was converted into a fee, that would cut off the children contrary to the intent of the testator, and contrary to the English rule, but to give effect to the intention of the testator, they construed it to be a life estate in the first taker with remainder to the children. It necessarily results that as the children must take under the devise, if effect is given to the intent, and as it is impossible for them to do so *in praesenti*, they must do so *in futuro*. This case sets aside technical rules, to give effect to the intent of the testator.

In *Doe vs. Laming*, 2 Burrows, 1100, the words of devise are: "I give and devise an equal undivided one-fourth part unto A. B. and to the heirs of his body lawfully begotten or to be begotten, *as well females as males*, and to their heirs and assigns forever, to be divided equally, share and share alike, as tenants in common and not as joint tenants." Testator lived two years after date of will. At date of will, devisee had two daughters, Elizabeth and Ann; devisee died in the lifetime of the testator; the two daughters, Elizabeth and Ann, survived

both the testator and the devisee; land, gavelkind — quaere. Did the death of the devisee in the lifetime of the testator cause the devise to become void or lapsed? Did the devise, or any part of it, descend to the heirs of the testator?

Lord Mansfield, Chief Justice: "It appears, therefore, from all that I have been saying that there is no such fixed invariable rule as has been supposed, that words of limitation shall never in any case be construed as words of purchase." And the present case is the strongest that I can form any imagination of to justify a construction that the heirs of the body of Ann Cornish shall here take as purchasers. The devise can not take effect at all, but must be absolutely void unless the heirs of her body take as purchasers. It must be observed that the lands devised by this will are *gavelkind*, the testator had nephews and nieces, and great-nephews and great-nieces, and he provides for them by four distinct clauses in his will according to the four distinct stocks. * * * And it is manifest that the testator does not here mean that this one-fourth should go in a course of descent in gavelkind for he gives it to the heirs of her body as well *females* as males, and mentions *females* not only expressly and particularly, but even prior to males; therefore they cannot take otherwise than as purchasers; it would be a void devise if the words were to be construed as words of limitation, for he breaks the gavelkind descent by giving it to *females* as well as males; it cannot descend to *females* aa well as males by the rules of gavelkind. * * * Upon the whole, as no man can doubt of this testator's intention and as this is the only method of effectuating it, and as there is no rule of law that prevents heirs taking as purchasers where the intention of the testator requires that they should do so, I am of opinion that judgment ought to be given for the defendant." * * *

"Mr. Justice Wilmot premised that the Court were obliged to the gentlemen who had argued this case at the bar for declining to go into that long string of cases usually cited upon this subject. For the principle that must govern all cases of this kind is the intention of the testator, provided it be not inconsistent with the rules of law. And all cases which depend upon the intention of the testator (which is the pole star for the direction of devises) are best determined upon comparing all parts of the devise itself without looking into a multitude of other cases, for each stands pretty much upon its own circumstances, and one is no rule for another, or very seldom at least."

That *Wild's* case never did refer to personalty, we refer your honor to the case of *Buffar vs. Bradford*, 2 Atkyns, 220. The will provides, after giving a life estate to Mary Bradford, or until she married, at her death or marriage, and then as much of the will as is necessary to be quoted, is as follows: "And the remaining four parts to my niece, Buffar, and the children born of her body." Lord Chancellor Hardwicke says: "The question is, what estate the testator's niece, Buffar, and her children take. She had no child at the time the will was made, but the plaintiff was born afterward in the lifetime of the testator, the mother of the plaintiff dies in the testator's lifetime.

"It was insisted on the part of the defendant, Mary Bradford, who had the estate for life, and who is likewise heir-at-law, that it is a lapsed devise, for that the plaintiff's mother took an estate tail, and that 'her children' are words of limitation and not of purchase where the devisee has none at the time of devise made; and, therefore, as the plaintiff's mother died before the testator, no estate vested in her, and consequently it is a lapsed legacy; and for an authority her counsel relied on *Wild's* case, 6 Co., 17.

"On the other hand, it must be allowed that children, in their natural import, are words of purchase and not limitation, unless it is to comply with the intention of a testator, where the words cannot take effect in any other way. But suppose a devise was to A and after his death to his children, here it is a word of purchase. It has been admitted very candidly by the counsel that as to the personal estate, the children, though born after the making of the will, must take equally with the mother as joint tenants. For where a man gives personal estate to A and her children, to construe the word children to be a word of limitation and not of purchase, would be a strained and remote construction, and would defeat the children entirely, and the first taker would have all *vide*, *Cook vs. Cook*, 2 Vern, 545. And Forth and Chapman adjudged on the same words in Lord Macclesfield's time, 2, Wms., 663: 'It is the time of possession in the present case which takes it out of the reasoning in Wild's case; for here Mrs. Buffar (and her children?) are to have four-eighths, and are to take at the same time as joint tenants. * * *

"The plaintiff, being born in the lifetime of the testator, would have taken with his mother as joint tenants, if she had lived; as she is dead, he shall take the whole by way of remainder."

We have given above all the opinion that bears on the question. The will in that case, like this, disposed of both real and personal estate. There could not be a life estate in personalty in the mother with a remainder in the children, or, in other words, there could not be an estate tail in personalty; and as it was the intent that the children should take in the personalty as well as in the realty, that intent could only be carried out by their taking at one time as joint tenants. That is precisely the case in the will under consideration, and disposes of the rule in Wild's case and of all the cases founded on it, and construes the will as we

claim this should be construed. If you make the words "heirs of the body," in this will, "children born of her body," as in Buffar's case, which is exactly what Romeo Lewis meant, then Buffar's case is exactly in point, and is an answer to all the learned argument of plaintiff's counsel on the construction of the will.

We think the argument of plaintiffs' counsel in this case fully justifies the criticism of Mr. Justice Miller as to the value of cases in the construction of wills in *Clark vs. Boorman's Ex'r*, *supra*, as well as that of *Mr. J. Wilmot*, *supra*.

It is manifest that the words of the devise do not create an estate tail at common law, or come within the rule in Shelly's case, by reason of the superadded words after "the heirs of her body" "to be equally divided between them, share and share alike." These words alter the rules of descent; and the divisees take *per capita* and not *per stirpes*; that is, take as purchasers and not by descent.

—See *Prescott vs. Prescott*, 10 B., Mon., 56.
—*McNair Adm'rs vs. Hawkins*, 4 Bibb., 390.
—*Mills vs. Horn*, 95 N. C., 362.
— *Ward vs. Jones*, 5 Ired. Eq., 400.
—*Swain vs. Rascoe*, 3 Ired. L., 200.
—*Herring vs. Rogers*, 30 Ga., 615.
—*Myers vs. Anderson*, 1 Strobh., Eq., 344.
—*Donnelly vs. Turner*, 60 Md., 81.

In *Faloon vs. Simshauser*, 130 Ill., 649, a deed was made to "Hannah Simshauser and her children." She had living seven children at the date of the deed, and one born afterwards. The question was, who took under the deed? The Court decided that Mrs. Simshauser and her seven children living at the date of the deed, took as tenants in common.

This case also holds that possession may be adverse and the statute of limitations begin to run without any paper title, and

that the right acquired under such possession may be transferred by a mere transfer of the possession without any written conveyance, and title by prescription ripen in the transferee.

In *Baker vs. Scott*, 62 Ill., at page 100, the Supreme Court of this state says: "The rule in Shelly's case is not to be reckoned among the great fundamental principles of juridical policy, which cannot be exceeded or transgressed by any intention of the testator, but is of a more flexible nature, and admits of many exceptions; for if the intention of the testator be clearly and manifestly contrary to the legal import of the words which he has thus hastily and unadvisedly made use of, the technical rule of law shall give way to this plain intention of the testator."

We will here add that our statute, by which "any conveyance shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or does not appear to have been granted, conveyed, or devised by construction or operation of law," was passed in July, 1837. See Purple's Real Estate Stat. of Illinois, p. 496.

The will, then, to Jane N. Lewis and her children, without any words of inheritance passed the fee, and they would take under it as purchasers, as tenants in common. The language of the will is, "I further give and devise to my dearly beloved wife, Jane N. Lewis, and to the heirs of her body * * * all the residue of my land in the states of * * * Illinois * * * to be equally divided between them, share and share alike."

Now, if the word "children" be substituted for "the heirs of her body," it would convey to her and them the fee as tenants in common, as a class, and she, being the only survivor, took the whole.

It is fair to state that this will has been submitted to the Courts of Ohio for construction, and the Intermediate Appellate Court has construed it as we claim; that is, as a devise to the wife and children as a class, and that the wife as survivor took the whole. The case, we understand, has been taken to the Supreme Court of that state, but so far as we are advised, has not passed into judgment in that Court.

In conclusion, we desire to say that in our opinion, the principal, if not the only question that the Court is called on to decide, is: Did the Court below rightly hold that the statute of limitations made a complete defense to the action? But as the learned counsel for plaintiffs in error has argued so earnestly the other questions raised below, and fully believing our contention both as to the construction of the will and the vesting of the fee to be sound, and that even if the statute of limitations did not make a perfect defense, yet that by a sound construction of the will the fee vested in Mrs. Lewis, we have thought proper to reply to the whole argument.

The case is submitted, confidently believing that no error will be found in the judgment of which plaintiffs in error can complain, but if the learned Judge below erred in his reasoning, those errors were only to the prejudice of the defendants, and that his final judgment is sound and cannot be overthrown without directly overruling the Supreme Court of the state where the land lies in construing its statutes, which construction has become a rule of property in this state.

And we think we can safely and rightfully conclude this reply by saying that no Court will be astute and learned in musty law in order to deprive these defendants of their homes which they bought honestly and honestly paid for, and have occupied for the average life of a generation, in order by some strained

construction of what are supposed to be technical words, to give the land to remote collateral heirs.

We respectfully submit the cases, in full confidence that the judgments will be affirmed.

R. E. WILLIAMS,
Counsel for Defendants in Error.

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1891.

Nos. 1211 to 1217, Inclusive.

ROMEO LEWIS, *et al.*,

vs.

ABRAHAM BARNHART, *et al.*

} Error to Southern Division of Northern District of Illinois.

REPLY FOR PLAINTIFFS IN ERROR.

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PALMER W. SMITH,
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of Counsel.

R. CREMER & BROS., PRINTERS, PEORIA.
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REPLY FOR PLAINTIFFS IN ERROR.

As we filed a full Brief and Argument covering all the questions arising upon the records in these cases, we will confine our reply to a few points in the argument of the counsel for defendants in error.

I.

It is alleged by counsel "THAT THE STATUTE OF LIMITATIONS IS A COMPLETE DEFENSE TO THE ACTION."

If the Statute of Limitations runs as against reversioners during the existence of a life estate, it would be idle to contend that the plaintiffs in error are not barred by the Statutes of Illinois.

It is directly and plainly stipulated that the defendants in all the cases have a complete chain of title, properly recorded, to the lands involved in each

case by mesne conveyances from Jane N. Lewis; and that the defendants and those under whom they claim title have been in actual possession, and paid taxes on their respective lands for a period exceeding twenty years. There are no contentions in regard to the facts in these cases.

If our views as to the construction of the will is correct,—that Mrs. Lewis only took a life estate, and that the reversion is in the plaintiffs in error,—then the Statute of Limitations could have no effect whatever until after the death of Mrs. Lewis.

As said by the Supreme Court of Illinois in *Orthwein* v. *Thomas*, 127 Ill., 569, "No words spoken or act performed" by Mrs. Lewis or those claiming under her, during the existence of the life estate, could in the least affect the rights of those entitled to the possession upon the termination of such estate.

It is true, that Mrs. Lewis more than twenty-five years ago, conveyed the lands in question by warranty deeds to the grantors of the several defendants in error; that they each went into the actual occupancy of the lands and improved the same; paid all taxes assessed thereon; claimed to be the owners in fee, and acted in good faith; yet under the law, none of these acts performed, or words spoken, or claims made, can in the least affect or prejudice the rights of the plaintiffs in error, as the reversioners of the estate.

The questions of claim and color of title in good faith, actual possession, and payment of taxes for the period of seven years, or any number of years, do not have bearing in any cases where the Statute of Limitations do not apply.

RECORDING ACTS.—Our learned adversary, on page 3 of his argument, says:

"I am not contesting the proposition that ordinarily the Statute does not begin to run against a remainder-man until the limitation of the life estate. But are there any exceptions to the rule? And do the facts of these cases bring them within the exceptions?"

It is then argued by counsel, that these cases should be excepted from the rule, because the plaintiffs were guilty of laches in not recording the will, or a certified copy of the probate thereof, in Woodford County, where the lands in question are situated, as constructive notice of the existence of the will; and also in not recording the patents from the United States to Romeo Lewis, as notice to subsequent purchasers of his being the patentee.

To sustain this proposition, counsel, on pages 4 and 9 of his argument, quotes the 5th Section of what he erroneously terms the "Recording Act of Illinois." (Rev. Stat. 1833, pp. 587–8.) The true title of the act being, "*An Act to abolish the office of State Recorder.*" This act was repealed by the Rev. Stat. of 1845, page 464.

Section 23, Chapter XXIV, entitled "Conveyances," of the Revised Statutes of 1845, is as follows:

"All deeds, mortgages and other instruments of writing which are *required* to be recorded, shall take effect, and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers, without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers, without notice, until the same shall be filed for record."

Rev. Stat. of Ill., 1845, page 108.

This section is identical with Section 5 of the repealed Act of 1833, except that the Act there fixed the time when it should take effect; *i. e.* "From and after the first day of August next," which words are omitted in the Rev. Stat. 1845. The section is retained in the revision of 1872, except that the word "*authorized*" is substituted for the word "*required.*"

Counsel, at page 8 of his argument, also quotes Sections 2, 7 and 16 of the Statute of Wills of 1833, which was repealed by the Revised Stat. of 1845, p. 464. These sections were substantially re-enacted by the Statute of 1845, pages 536, 538 and 540.

The skillful manner in which counsel has quoted these sections of the Statute may be to some extent misleading. He quotes the sections from the Statute of Wills, and immediately follows them by quoting the section from the Conveyance or Recording Act, so as to make it appear that they form a part of the same subject; whereas those in the Statute of Wills relate solely to matters of probate, and the section in the Statute of Conveyances, relates to the recording of deeds, etc., so as to give notice to subsequent purchasers, etc.

Counsel claims that, under these combined sections, the will is inoperative because it was not recorded in the Recorder's office, or the office of the Probate Court of Woodford County.

Learned counsel is very much in error when he says, on page 9 of his argument, that:—

"The effect of which statutes was to make a will inoperative in this state, as a conveyance, until the will, with its probate, if a domestic one, was proved and recorded in the Probate Court of the proper county; and a foreign one equally inoperative to pass

title until a certified copy thereof, accompanied with a certificate of the proper offices, that said will, testament, codicil, or copy thereof, was duly executed and proved, agreeable to the laws and usages of that State or country in which the same was executed, shall be recorded as aforesaid, and shall be good and available in law in like manner as wills made and executed in this State."

He seems to have entirely overlooked Section 40 of said Chapter XXIV, the Conveyance Act of 1845, which provides, that:

§ 40. "*This Chapter shall not be construed so as to embrace Last Wills and Testaments.*"

Rev. Stat. of Ill., 1845, page 110.

Referring to said Section 23, which is contained in the same chapter, counsel, on page 4 of his argument, says:

"This Statute, as re-enacted in 1872, has been construed by the Supreme Court of Illinois, in a case on all fours with this—*Dugan* v. *Follett*, 100 Ill., 581—and it is respectfully submitted, that unless this Court directly overrules the Supreme Court of the State where the land is situated, in a case construing the Statute of the State, and which has become a rule of property in the State, these judgments must be affirmed."

The case of *Dugan* v. *Follett* is not "on all fours with this." The decision in that case was based on the non-recording of a deed, which clearly comes within the 23rd Section of the Rev. Stat. of 1845, and Section 30 of Chapter 30 of the Rev. Stat. of 1872. While in the cases at bar, which relate to wills, the Statute was not intended to apply, because, as shown by Sec. 40, that Chapter, in which said Section is included, "*shall not be construed to embrace last wills and testaments.*"

Section 40 is a complete answer to all that is said by Mr. Williams with reference to the recording of the will, or a certified copy of the same, with the order of probate, etc. Besides, as claimed in our original brief, no duty devolved on the plaintiffs in error to record the will in any event.

In the *Dugan-Follett* case, at page 591, the Court use this language:

"The recording and limitation laws are both a part of the law of the State, and of equal force and validity, and the Courts should so construe and apply them as to effectuate the objects and purposes of the legislature in adopting them. The 30th Section of Chapter 30 of the Revised Statute (1872,) entitled "Conveyances," provides, "that all deeds, mortgages, etc., shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers without notice, and all such deeds shall be adjudged void as to all such subsequent purchasers without notice until filed for record." To hold that appellants, under the facts in this case, are to be affected in any manner by the Jenning's deed, would be to simply disregard this plain provision of the Statute, which we are not permitted or inclined to do."

In that case, the deed conveyed the land there in question to Mrs. Jennings for life, and the remainder to her six children. Mrs. Jennings and some of her children remained on the farm, and conveyed it. The other children, who were not in possession, failed to record the deed. The decision was based solely on the fact that the heirs *who had a deed* failed to record it; and the appellants claimed independently of the Jennings deed.

Section 40 of the Revised Statutes of 1845, remained the law of Illinois until the Act of February

14, 1857, which went into effect subsequent to the purchases of any of the land in controversy by the grantors of the defendants in error. Their purchases were in no event affected by such act; nor were they injured because a certified copy of the will was not recorded after the Act went into effect, and after they had purchased the land from Jane N. Lewis.

Counsel for defendants in error, on page 10 of his argument, suggests that the Statute of Limitations began to run after the Act of 1857, if not before. To this we reply, that the Statute requiring all deeds, etc., to be recorded, was for the protection of *subsesequent purchasers*, etc., without notice, and not prior purchasers. And the grantors of the defendants were purchasers prior to the passage of the Act of 1857, and not *subsequent purchasers*. The Statute is not retrospective.

Section 2 of the Act of February 14, 1857, which is incorporated in the revision of the Conveyance Act in 1872, is as follows:

§ 33. "All original wills duly proved, or copies thereof duly certified, according to law, and exemplifications of the record of foreign wills made in pursuance of the law of Congress in relation to records in foreign states, *may be recorded in the same office where deeds and other instruments* concerning real estate may be required to be recorded; and the same *shall be notice* from the date of filing the same for record as in other cases. * and certified copies of the record thereof shall be evidence to the same extent as the certified copies of the record of deeds."

Ill. Laws of 1857, pages 39;

1 Starr & Curtis' Ill. An. Stat., 597.

The words after the * were added by the revision of 1872.

In our original argument, on page 88, we stated that "there was no Statute in Illinois authorizing the recording of original wills duly proved, or copies thereof duly certified according to law and exemplifications of the record of foreign wills until the Act of February 14, 1857."

This statement was too general in terms. What we meant to say, and now say, is, that there was no Statute authorizing such record, *so as to operate as notice to subsequent purchasers, etc.*, until the enactment of 1857.

It is true that the Statute of Wills did authorize the recording of all wills, testaments, and codicils, or authenticated copies thereof, proven according to the laws of any of the United States, etc., "*and touching or concerning estates within this State*," to be recorded. But this recording was solely for purposes of probate, and preserving evidence, and affecting both real and personal estate of the tesator; but such recording was not for the purpose of giving constructive notice to subsequent purchasers, etc., without notice.

The contention of our learned adversary, that the provisions in the Statute of Wills, applied to these cases; and that the will in question is inoperative, because it was not recorded in the office of the Probate Court of Woodford County, is manifestly erroneous, as shown by the following decisions of the Supreme Court of Illinois:

In *Shephard* v. *Carriel*, 19 Ill., 313, a will offered in evidence was objected to, because it had not been recorded in the County in Illinois where the land was situated. The Court held, that the probate is merely evidence of the right conferred by the will; and that

a will, executed and proved in another State, *need not be filed in the Probate Court of Illinois.*

This decision was rendered in 1857, and while the provisions of the Statute of Wills relating to recording of wills in the Probate Court were in force.

In *Newman, et al.* v. *Willetts*, 52 Ill., 99, decided in 1869, it was held, that where a will, executed in another State, and probated there, and the record and proceedings in respect thereto, are authenticated in conformity with the Act of Congress of May 26, 1790, providing for the authentication of the public acts, records and judicial proceedings in each State, so as to take effect in every other State, such will is admissible in evidence in the Courts of Illinois without having been probated here. And it was there further held, that it is not essential to support a title to land lying in this State, claimed under such will, that the will should be recorded in the County where the land is situated.

See *Olleman* v. *Kelgore*, 52 Iowa, 38, cited in our original argument, p. 63.

In *Safford* v. *Stubbs*, 117 Ill., 389, cited by counsel for defendants in error, and referred to by us on page 86 of our original argument, the will there in question was probated in Pennsylvania, but was never admitted to probate, or recorded in the County where the land is situated, no question was raised as to its being effectual to pass title as against a subsequent purchaser, without notice. That case is very much in point on the question now under consideration.

RECORDING OF PATENTS.—It is claimed by counsel for defendants in error that the patents from the

United States to Romeo Lewis for the lands in controversy were required to be recorded in the Recorder's office in the County where the lands are situated, in order to be effective as against subsequent purchasers, the same as deeds between individuals.

The laws of Congress require patents to be recorded in the General Land office at Washington; but there is no law in Illinois requiring them to be recorded in this State, as notice to subsequent purchasers.

It would be absurd to suppose that the defendants in error or their grantors were ignorant of the fact that the United States were the source of the title to the land they were about to purchase; and that Jane N. Lewis could not be the original source. They must have known that some person must have acquired, and held patents from the General Government; and they knew that Romeo Lewis was the patentee.

The Recording or Conveyance Acts of Illinois do not apply to Patents from the United States.

In *Graves, et al.* v. *Bruen, et al.*, 1 Gilm., 167, it was decided that the recording acts do not apply to patents eminating from either the United States or the State. That they are admissible in evidence without proof of execution, and without showing that they were regularly acknowledged and recorded; as in case of deeds between individuals.

The case cited was an action of ejectment, in which the plaintiff offered in evidence an Auditor's deed, which was objected to on the ground that it had never been acknowledged or recorded. The Supreme Court of Illinois in its opinion, on page 171, say:

"We can only see two questions which can arise upon this voluminous record. The first questions the admissibility of the Auditor's deed, without proof of execution, or without showing that it was regularly *acknowledged and recorded* as in case of deeds between private individuals. It is hardly necessary to say that *the registry acts do not apply to Patents eminating from either the State or the United States.* In case of loss of the original patent, a copy from the record would not be admissible as secondary evidence to supply its place; and would be of no effect for that purpose. It is necessary, in such cases, to obtain a duplicate patent from the authority which issued the first patent. The registry laws have no application in such cases."

PLAINTIFFS HAD NO RIGHT OF ACTION BEFORE MRS. LEWIS' DEATH TO MAINTAIN AN ACTION TO COMPEL PAYMENT OF TAXES.—Learned counsel seems to agree with Judge BLODGETT only on one question. At page 11 of his argument, he says the Court below was right in holding that the plaintiffs in error, or those under whom they claim, *could have enjoined Mrs. Lewis or any one claiming under her from committing waste;* and if Mrs. Lewis neglected or refused to pay the taxes and suffered the property to be sold for taxes, thereby endangering the title in fee, they could have filed a bill in equity, and had the property placed in the hands of a receiver with power to redeem from such sale.

The authorities referred to by Judge BLODGETT in support of his opinion, and cited in argument by counsel for defendants, are Story's Eq. Jur., Sec. 913, and High on Receivers, Secs. 11 and 672. These authorities are not in point against our position; both refer to cases where there was a present vested interest; and not to cases of reversionary or possibility of reversion.

It must be remembered that Romeo Lewis had actually devised the estate after Mrs. Lewis' death to the *heirs of her body*, so that, before *his* heirs could take, three things must occur:—1st. Mrs. Lewis must have died, and thereby terminated her life estate; 2nd. She must not have left heirs of her body; 3rd. The present plaintiffs in error must have been at *that period* the heirs of Romeo Lewis.

It was a mere possibility of reversion.

It is then clear that prior to the death of Jane N. Lewis, the plaintiffs in error had no right to maintain an action to compel the payment of taxes.

In the case of *Romeo Lewis, et al.* v. *William F. Mohr*, (see appendix to our original argument, page 105,) Judge BLODGETT, in construing Romeo Lewis' will, held, as we claimed, "That whoever were the heirs at law of Mr. Lewis at the time Mrs. Lewis' life estate ended, took the estate in reversion," thereby holding that the title was in *abeyance* until that period, and judgment was accordingly rendered against Mohr.

It seems impossible to reconcile this holding with the idea, that the Statute of Limitations was running against the plaintiffs prior to the death of Mrs. Lewis, and prior to the time when plaintiffs became Romeo Lewis' heirs, and while there was an existing outstanding life estate in Jane N. Lewis, and a valid devise of the remainder "to the heirs of her body."

Counsel for defendants, (pages 11 and 12 of Arg.) cites, *Pike* v. *Wassell*, 94 U. S., 712, as holding that those having a possibility of the reversion could maintain an action during the life of the tenant for life to compel payment of taxes. An examination of

that case shows that it is not in point, and in fact it is in our favor. The suit was by the heirs of Albert Pike, who had been engaged in rebellion against the United States, whose life estate had been forfeited and sold under the Confiscation Act, to compel Wassell, the purchaser of his life estate, to pay the taxes. The Courts say that the judgment and sale "Left no estate or interest of any description which he (Pike) could convey by deed, and no power which he could exercise in favor of another; and that the joint resolution passed contemporaneously with Act 12, Stat. 627, was intended for the benefit of his heirs exclusively, to enable them to take the inheritance after his death." It was as if Albert Pike was dead and his heirs had a vested estate, subject only to his life estate which had been forfeited and sold. The Court then says "The defendant (Wassell) as tenant for life is bound in law to pay the taxes upon the property during the continuance of the life estate."

As to whether the heirs of Pike had a right to maintain the action, the Courts say:

"It is true as a general rule that so long as the ancestor lives the heirs have no interest in his estate; but the question here is as to the rights which the Confiscation Act has conferred upon the heirs apparent or presumptive of one whose estate in land has been condemned and sold."

"In *Wallack* v. *Van Riswick*, 92 U. S., 207, it was decided that the fee was withheld from confiscation exclusively for the benefit of the heirs; they, and they alone, could take it at the termination of the life estate. The children of Albert Pike, as his heirs apparent, are also apparently the next in succession to the estate; either they or their representative must

take the title when their father dies. They are the only persons now living who represent those for whose benefit the joint resolution of Congress was passed. 'Under these circumstances as there is no one else to look after the interests of the successsion we think they may properly be permitted to do whatever is necessary to protect it from forfeiture or incumbrance.'"

Albert Pike, after the seizure, had no power by Deed, Will or in any other way to divert this estate from his children, or their representatives. The right of the children of Pike to commence the suit, it will be seen, was based solely upon the language and purpose of the Confiscation Act and the joint resolution of Congress passed contemporaneously therewith.

In *Illinois Cen. R. R.* v. *Bosworth*, 133 U. S. R., 102, the Court, referring to the Pike case, say "Heirs apparent have in a *special case* been received to intervene for the protection of the property from spoliation (94 U. S., 711.) This was allowed from the necessity of the case arising from the fact that the ancestor's disability prevented him from exercising any power over the property for its protection or otherwise, and no other persons but the heirs apparent had even a contingent interest to be protected.

This "special case," then, will not be permitted to over-ride "the general rule."

The decision of the lower Court in holding, that the plaintiffs, or those under whom they claim, under the facts in the case, could have enjoined Mrs. Lewis, or any one claiming under her, from committing waste; or that they could have filed a bill in equity,

and had the property placed in the hands of a receiver, with power to redeem from the tax sale, we respectfully submit, is unsupported by authority, precedent, sound reason, or logic. The plaintiffs in error prior to the death of Mrs. Lewis in 1888, simply had a possibility of reversion. They had no actual or vested estate. They had no more right to file a bill for an injunction, or for the appointment of a receiver to redeem from the tax sale, than an expectant son has with reference to his father's estate during the life of the father; or a wife, having an inchoate right of dower, which is a mere intangible contingent expectancy, to bring an action against her husband, or any one claiming under him, during his life, to assert her contingent expectancy.

No one can maintain an action but he who has an immediate and vested estate. This contention is fully supported by authority, and founded upon reason.

The able Judge, who tried the cases in the Court below, held in the case of *Lewis, et al.* v. *Wm. F. Mohr*, (see app. to our original argument, page 106,) that whoever were the heirs at law of Mr. Lewis at the time Mrs. Lewis' life estate ended, took the estate in reversion.

It could not be ascertained until her death who would take the estate, or in whom it would vest. How then could it be said, that these mere possible contingent reversioners in expectancy were guilty of laches in not asserting their possible contingent expectancy in land nearly forty years before they acquired a vested interest by the death of the life tenant?

These views are fully supported by the authorities we have cited on pages 78 to 80 inclusive of our original argument.

If the position of the learned Judge, that the plaintiffs in error "could have enjoined Mrs. Lewis, or any one claiming under her, from committing waste," is tenable, then the question naturally arises, as to what acts of Mrs. Lewis, or those claiming under her, had been committed, or were threatened, that would warrant the issue of an injunction?

We cannot imagine any such wrongs or threats as would justify the issuing of a restraining writ.

The only complaint that could have been made against Mrs. Lewis was her failure to pay the taxes in the usual way, and permitting the land to be sold for taxes, and bidding them in at the tax sale and taking a tax deed; but this worked no injury as against the plaintiffs, because the Courts have repeatedly held, that she would acquire no title thereby; that by her acts she simply paid the taxes, which she was bound to pay, in that way.

There was no ground for filing a bill in equity for the appointment of a receiver to redeem from the tax sale, because the taxes were already paid in the manner Mrs. Lewis had chosen to pay the same, and there was nothing to redeem from. The plaintiffs in error were under no legal or other obligation to pay the taxes; but Mrs. Lewis was bound to pay them, as life tenant. To have redeemed from the tax sale, would simply be refunding to Mrs. Lewis money to which she was not entitled. It was her duty to pay the taxes, which she did in the manner she chose to adopt.

The tax sale was *undum pactum*, and worked no injury to the plaintiffs.

If Mrs. Lewis had abandoned the property, and the same had been regularly assessed and sold for taxes, and bid in by a stranger, and all the requirements of the statute been complied with, so that the purchaser, in the event the property was not redeemed, would have acquired thereby a perfect title in fee, then the possible contingent interest of the plaintiffs might have been in peril. And if they then had had a vested interest, as remainder-men or otherwise, a court of equity might have been invoked for the appointment of a receiver to redeem from the tax sale. But as no such supposed case existed, there was no necessity or reason for applying for an injunction or the appointment of a receiver.

Tax Deed as Color of Title.—Learned counsel, on page 15 of his argument, asks, "Was the Tax Deed Color of Title?"

A simple *color of title* is of no avail where the Statute of Limitations does not operate. And if we are correct in our contention that the limitation laws cannot run as against reversioners or a remainderman until after the termination of the life estate, it is useless to occupy the time of the Court in discussing the question as to what is a *color of title*. It is of no avail except in cases where the Statute can be interposed as a bar to a recovery, and is not applicable in these cases.

The same may be said in reference to the other conditions necessary to the defense of the Statute: such as payment of taxes; seven years possession, etc. These questions are only material where the

Statute of Limitations can be interposed as a bar to a recovery.

CONSTRUCTIVE NOTICE THAT THE LANDS WERE SOLD FOR TAXES AS ROMEO LEWIS' PROPERTY.—While we have never considered the question of notice as an important one in these cases, we think there was constructive notice if not actual notice to the defendants and their grantors that Romeo Lewis was the patentee of the lands in controversy. We will review the authorities cited by counsel, at page 15 of his argument, on this point.

By the 22nd stipulation, (Record p. 8.) it is admitted that Romeo Lewis entered the lands in question in 1838, and received patents therefor from the United States. On Sept. 1st, 1839 the Auditor forwarded to the County Clerk a description of these lands for the purpose of taxation, as appears from the Book of Land Entries in the Woodford County Clerk's office. It was proved also by the testimony of J. C. Irwing, Clerk of the Circuit Court and Recorder of Woodford County, that the lands were assessed and sold in the name of Romeo Lewis, as patentee and owner. (Record p. 20.)

The defendants claim title under the tax deed. (Record pp. 17–18.) This deed does not name Romeo Lewis as owner, but it recites the rendition of a judgment in favor of the State against said lands at the September Term 1846, also a sale to Roots, and an assignment of the certificate of purchase to Jane N. Lewis. We claim this was sufficient to put the purchasers under Jane N. Lewis upon inquiry. The Book of Land Entries, showing the date of entry and name of patentee, was one required by law to be

kept. The sale of the lands for taxes, which is recited in the tax deed, informed the searcher of title that the land had been assessed in the name of some one. If it was not notice in itself, it was at least enough to put the purchaser upon inquiry. Jane N. Lewis *did* know all about it. (Stipulation 22, Record p. 8.)

In *Anthony* v. *Wheeler*, 130 Ill. 135, the law is thus stated: "Any facts or circumstances coming to the knowledge of the subsequent purchaser, which would put a prudent man on inquiry, and which pursued, would lead to actual notice of an unrecorded deed lying in the apparent chain of his title, is sufficient to invalidate the subsequent purchase."

The first and most natural thing to inquire would be, in whose name had this land been assesed and sold? Was the owner a minor, insane, or femme couvert? Were there any facts which would prevent this tax title being valid?

In fact there was no judgment, as the tax deed erroneously recites. (See Testimony of J. C. Irving, Record p. 20.)

Counsel for defendants in error claims that this question has been decided the other way in *Bourland* v. *County of Peoria*, 16 Ill., 538; *Anthony* v. *Wheeler*, 130 Ill., 128; *Bestor* v. *Rankin*, 77 Ill., 290; but this is an error. In the first case cited, *Bourland* v. *County of Peoria*, the record of a sale of the lots in the County Commissioners' Court to a prior party was offered to defeat a subsequent sale to a second party, who had no notice of the prior sale. The Supreme Court of Illinois held it could not be done. But suppose there had been but *one sale* made by order of the County Commissioners' Court, would not a party

claiming under a deed, made in pursuance of an order for such sale, at least put him on inquiry to know all about it? This is the case at bar.

In *Anthony* v. *Wheeler, supra*, all that is decided is, that a record of a decree of the Probate Court authorizing a sale of lands to pay debts is not constructive notice of an administrator's deed, though the decree may be in the same County in which the land lies. But in that case the party was claiming under a deed from the heir, and had no notice of the administrator's deed, which had not been recorded. He was not claiming under the administrator's deed. The Court quotes, with approval, *Bourland* v. *County of Peoria, supra.*

In *Anthony* v. *Wheeler*, if, instead of claiming under a deed from the heir, the party was claiming under the administrator's deed, would he not be charged with notice of the order and proceedings of the Court which authorized said deed?

In *Bestor* v. *Rankin, supra*, the party was not claiming under a tax deed, hence the entries in the Land Book were not constructive notice.

In *Stokes* v. *Riley*, 121 Ill., 167, it was held, that where a purchaser of land finds on examination of the public records, a judgment against his vendor, and a certificate of purchase showing a sale under execution, but the record failed to show that a deed had been made, it will be incumbent on him to make inquiry whether a sheriff's deed had been made or not; and failing to do so, he will be chargeable with notice of the existence of such deed. And the Court, in *Anthony* v. *Wheeler, supra*, referring to the case of *Stokes* v. *Rankin*, say, the judgment in that case was,

by the Statute, made a lien, and the subsequent purchaser was bound to take notice of it, as held in *Bourland* v. *County of Peoria*, 16 Ill., 538.

We ask, were not the taxes assessed in pursuance of law a lien on Romeo Lewis' land? And will the holder *under a tax deed* of the lands be heard to say he had no notice in whose name the lands were assessed and sold?

The same may be said as to the recording of the patents. They were duly recorded in the Land office at Washington City. The Book of Land Entries in the Woodford County Clerk's office, and the Collector's books showed that the lands were assessed in the name of Romeo Lewis, as patentee and owner. (See Irving's testimony, Record p. 20.) Besides, as we have seen, the recording laws of Illinois did not apply to patents emanating from the United States.

Besides, as we have urged in our original argument, the question of notice is not material, as the plaintiffs do not claim under the will of Romeo Lewis, and not being required to place it on record, or to pay the taxes, or even to make an inquiry during the existence of the life estate, relying upon the well settled law as stated in *Orthwein* v. *Thomas*, 127 Ill., 550-560, that "No words spoken, or act performed by Thomas Osborn, the life tenant, *or those claiming under him*, during the existence of his life estate, could in the least affect the rights of those entitled to the possession upon the termination of his estate."

THE WILL WAS NOT OFFERED BY PLAINTIFFS AS MUNIMENT OF TITLE.—Counsel for defendants in error, on page 8 of his argument, claims that the

will was offered by the plaintiffs as a muniment of title; and asserts that a recovery by them would be impossible without producing the will.

It will be seen from the Record, page 11, that the plaintiffs introduced the will solely for the purpose of showing that the estate of Jane N. Lewis was a life estate only; and that it was her duty as such life tenant and as executrix of the will, to have paid the taxes on the lands in controversy.

It was offered by the plaintiffs for the purpose of showing *why* the Statute of Limitations should not run against them; and also to show that as there were no heirs of the body of Mrs. Lewis at her death, that the *law*, not the *will*, gave the lands at her death to plaintiffs in error.

II.

WHEN AND WHERE DID THE FEE VEST?

Counsel for defendants in error, on page 17 of his argument, contend, that "If, on the death of Romeo Lewis, the fee did not vest in Jane N. Lewis, as devisee under the will, it vested in his heirs at law."

The Court below held, that "by the operation of the 6th Section of Chapter 30 of the Revised Statutes of Illinois, title, 'Conveyances,' which was in force at the time the will in question was made, and took effect, Mrs. Lewis took only an estate for her natural life, and at the death of Mrs. Lewis, in default of the heirs of her body, the heirs at law of the testator, Romeo Lewis, took the fee."

In this decision, counsel claims that the Court below erred.

We fully discussed this point in the cases in our

original argument, pages 43–53; and cited numerous authorities which sustain the rulings of the Court. We desire to add nothing to what we there said.

III.

WHO WERE THE HEIRS OF ROMEO LEWIS?

Under this head, counsel for defendants in error contends, that Jane N. Lewis, as widow, under the Statute of Illinois, was an heir to one-half of her husband's real estate in fee; and that Romeo Lewis left one brother living, Harry Lewis, and the descendants of two deceased brothers. That Harry Lewis, afterwards died intestate, leaving a widow and one son. That the son afterwards died, never having been married, and intestate, and by the laws of Illinois, his mother became his sole heir. That the mother devised this interest to Jane N. Lewis. That this interest was one-third of one-half, or one sixth, which added to the one-half that Jane N. Lewis took as heir, gave her two-thirds, which is now vested in the defendants as the grantees of Jane N. Lewis, under deeds with full covenants of warranty. If this contention is sustained, the plaintiffs in error would only be entitled to one-third of the lands in controversy. This contention is erroneous.

The Court below, in the case of *Mohr*, Appendix to original argument, p. 106, held, that Mrs. Lewis, having elected to take under the will, waived all rights as heir at law, under the laws of Illinois, of her husband.

In our original argument, pages 59–60, we have alluded to the effect of the widow's election to take the provisions made for her in the will; and believe

the decision of Judge BLODGETT is fully sustained by the authorities there cited.

In the opinion in these cases and in the Mohr case, the Court below held, "that, whoever were the heirs at law of Mr. Lewis at the time Mrs. Lewis life estate ended, took the estate in reversion."

We have discussed the question as to when and where did the fee vest in our original argument, pp. 43 to 55 inclusive; and we respectfully submit, that the authorities there referred to, show that the fee vested *at the time* of the termination of the life estate of Jane N. Lewis in those who were then the heirs of Romeo Lewis, and not at the death of the testator.

I V.

THE CONSTRUCTION OF THE WILL.

In the preperation of our original argument we had before us the able argument of our learned adversary which was submitted on the trial of these cases in the Court below, and were thereby enabled to anticipate and meet nearly all that is said by counsel in his argument in this Court. We, therefore, submit this branch of the case on what is presented in the original argument.

CONCLUSION.

Learned counsel for defendants in error concludes his able and ingenious argument by saying, "that no Court will be astute and learned in *musty* law in order to deprive these defendants of their homes which they bought honestly, and honestly paid

for, and have occupied for the average life of a generation, in order by some strained construction of what are supposed to be technical words, to give the land to remote collateral heirs."

It may be true that the principles of construction for which we contend, and upon which we largely rely, may be somewhat ancient in their origin. The rules in *Wild's case* were adopted centuries ago. But they have never become "musty." They have, by universal application in judicial decisions, and approving comments of eminent legal writers, been kept so clear as to illume the legal horizon, and serve as a settled guidance in all judicial determinations both in England in this country from the time of their adoption to the present day.

Judge STORY, in *Sisson* v. *Seabury*, held them to be good law; and they have been recognized and followed by the Courts of every State in the Union in cases where these rules are applicable; and become so fixed, and thoroughly woven into the jurisprudence of all countries where the common law prevails, as not to be shaken. warped or distorted, as rules of property, by mere sentimentality, even were their application to "deprive these defendants of their homes, which they bought honestly, and honestly paid for, and have occupied for the average life of a generation," and "to give the land to remote collateral heirs," who are now entitled to it by the laws of the land, and the relationship by consanguinity which they sustain to their ancestor, Romeo Lewis.

If the plaintiffs in error, as heirs of Romeo Lewis, fail in these cases to recover their lands, it will furnish a most glaring instance in which parties have been